(18,580.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 352.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILL HOLLOWAY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Will Holloway was defendant in error, which said transcript of record is in the words and figures following, to wit:

(*a*)

a United States of America—ss.

The President of the United States, To the Honorable the Judges of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas—Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term, 1901, thereof, between Will Holloway, plaintiff and The Choctaw, Oklahoma and Gulf Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, Choctaw, Oklahoma and Gulf Railroad Company, as by complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 22nd day of August, 1901, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of June in the year of our Lord one thousand nine hundred and one.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

Issued at office in the City of Little Rock, with the seal of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas dated as aforesaid.

W. P. FEILD,

Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.

Allowed by
JACOB TRIEBER, Judge.

Service acknowledged. J. W. HOUSE,
Atty. for Holloway.

Indorsed: Filed June 22, 1901. W. P. Feild, Clerk.

Return to Writ.

United States of America,
Western Division of the
Eastern District of Arkansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Little Rock, this 13th day of July A. D. 1901.

W. P. FEILD,
Clerk of said Court.

1 Be it remembered that on the 29th day of March, 1901 came into the office of the Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, the Choctaw, Oklahoma and Gulf Railroad Company by J. W. McLoud and E. B. Peirce, Esqs., its attorneys and filed therein its transcript on removal from the Lonoke Circuit Court of Arkansas in case of Will Holloway vs. Choctaw, Oklahoma and Gulf Railroad Company, which transcript of proceedings in said Court is in the words and figures following, to wit:

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Pleas before the Hon. Geo. M. Chapline Judge of the Lonoke Circuit Court on the 7th day of Feb. 1901.

Will Holloway
vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Complaint at Law.

On this day comes the plaintiff W. H. Holloway and for cause of complaint herein, states that on the 30th day of October, 1900, he was employed by the defendant company as a fireman, and was then engaged in his duties as such
2 fireman, that on the night of said day he and one W. H. Davis, who was employed by said defendant Company as an engineer were at Brinkley, Monroe County, Arkansas, and while there, the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher of defendant Company at Little Rock, Arkansas, at about 11 o'clock at night directing them to back up the switch engine No. 3 from Brinkley east to Hulbert a distance of about fifty-eight miles; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the head-light would be in front and they would thereby be enabled to run the same with greater safety, but this request was refused and they were directed by said chief night dispatcher at Little Rock, Arkansas, to back said switch engine down to Hulbert a distance of about 58 miles, in the night-time as aforesaid, when it was dark, that in obedience to such orders and directions, the said Davis as engineer and this plaintiff as fireman left Brinkley about 11.17 p. m. with said switch engine No. 3 backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached Trestle No. 547 a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse on said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed and the plaintiff was caught between the tank and the engine and was thereby seriously and permanently injured as follows to wit:

Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he suffered continuous and excruciating pain; both in body and mind ever since, and he continues so to suffer; that said broken ribs, bruised and lac-
3 erated kidneys and other bruises and lacerations and injuries, were all received by him on account of and by reason of the negligence of the defendant company; that said negligence of the defendant company consists in this, to wit;

1st. In directing the said Davis and this plaintiff to run said switch engine backwards in the night-time when it was dark.

2nd. In not providing for and having a headlight on the back end of said engine.

3rd. In not placing a man on the foot board in front of said engine, with a white and red light, as required by the rules of said defendant company, and as required by law.

4th. In not providing for and furnishing said engine with a pilot or cow catcher.

5th. That said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights. It was a square or box engine and did not slope forward and downward so as to give a better view in front of the engine.

6th. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman; and it negligently failed to do so in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence as above stated the plaintiff has suffered the injuries above mentioned and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of Ten Thousand Dollars. He further states that the defendant company is a railway corporation organized under the laws of the State
4 of Arkansas and is and was on said date running and operating a railroad in this state through Pulaski, Lonoke and other counties. He further states that by reason of said injuries caused by the neglect of the defendant as above stated he has been forced to make a drug and medical bill in the sum of seventy-five dollars; wherefore he prays judgment for the sum of $10,075.00 and for such other and further relief as he may be entitled to.

(Signed) J. W. HOUSE, Attorney.

State of Arkansas,
County of Pulaski.

Will Holloway states that he is the plaintiff in the above cause and that he believes the statements set forth therein are true.

(Signed) WILL HOLLOWAY.

Subscribed and sworn to before me this 9th, Nov. 1900.

(Signed) ELLEN W. REINHARDT.

My Commission expires Dec. 24th, 1902.

Filed and summons issued this 10th November, 1900. W. T. Couch, Clerk. By J. D. Shute, D. C.

Summons Circuit Court.

State of Arkansas
To the Sheriff of Lonoke County:

You are hereby commanded to summons Choctaw, Oklahoma and Gulf Railroad Company to answer on the first day of the next Feby. term of the Circuit Court of Lonoke County a complaint filed against it in said court by Will Holloway and warn it that its failure to answer the complaint will be taken as confessed and will make due return of this summons on the first day of the next Feby. term of this court.

Witness my hand and the seal of said court this 10th day of November, 1900.

(Signed) W. T. COUCH, Clerk.
[Seal] by J. D. SHUTE, D. C.

Endorsed on the back as follows:

State of Arkansas
County of Lonoke.

On the 10th day of Nov. 1900 I have duly served the within writ by delivering a copy and stating substance thereof to W. G. Bramford Agent, of Choctaw, Oklahoma and Gulf Railroad Company at Lonoke Ark. as I am herein commanded.

(Signed) A. J. WALLS, Sheriff.

Proceedings had on the 7th day of February 1901.

Motion for Removal.

On this day comes the defendant by its attorney J. E. Gatewood Esq. and by leave of court filed its motion to remove this cause to the Federal court which petition is in words and figures as follows:

To the Hon. George M. Chapline Judge of the Circuit Court of Lonoke County, Arkansas. Your petitioner respectfully shows that it is the defendant in the above entitled suit, and that the matter and amount in dispute in said suit exceeds exclusive of interest and costs, the sum or value of $2000. That your petitioner was at the time of the bringing of this suit and still is a corporation organized under an act of Congress of the United States entitled "An Act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company" which was approved August 24th, 1894, and that the plaintiff was then and still is a citizen of the State of Arkansas. That said suit is of a civil nature, the same being an action at

6 law by the plaintiff to recover against this defendant for personal injuries alleged to have been caused to plaintiff by the negligence of the defendant in operating a railroad alleged to have been owned by it. That said suit is one arising under the laws of the United States in this to wit, that the defendant is a corporation organized and incorporated under the provisions of an act of Congress of the United States entitled an act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company, to organize a corporation and confer upon the same all the powers privileges and franchises vested in that company which was passed by the Congress of the United States and approved on the 24th day of August 1894, and, under the provisions of which act of Congress defendant maintains its corporate capacity and carries on business as a railroad company.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States for the Western Division of the Eastern District of Arkansas in the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for this cause to said Circuit Court and to accept the said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States for the Western Division of the Eastern District of Arkansas and it will ever pray.

(Signed) E. B. PIERCE,
Attorney for Petitioner.

7 State of Arkansas
Pulaski County.

J. W. McLoud being first duly sworn on oath states that he has read the above and foregoing petition for removal and is familiar with the contents thereof and that the same is true, as he verily believes, that said Choctaw, Oklahoma and Gulf Company is a corporation and [the] he is its General Solicitor.

(Signed) J. W. McLOUD.

Subscribed and sworn to before me this 5th day of Feb. 1901.

(Signed) I. H. SPEERRIER, N. P.
[L. S.] My commission expires Oct. 16th 1903,

which petition is granted and ordered by the court that the cause be transferred to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas and it is further ordered that the clerk of this court transmit

to the clerk of the Federal Court a transcript of all the record, orders and papers on file in his office in the above entitled cause.

"Bond."

Know all me by these presents: That the Choctaw, Oklahoma and Gulf Railroad Company as principal and E. B. Pierce and J. W. McLoud as sureties are held and firmly bound unto Will Holloway in the sum of Three hundred dollars for the payment whereof, well and truly to be made unto the said Will Holloway his successors and assigns, we bind ourselves, our heirs, representatives and assigns jointly and severally, firmly by these presents; Yet upon these conditions; The said Choctaw, Oklahoma and Gulf Railroad Company having petitioned the Circuit Court of Lonoke County, Arkansas for the removal of a certain cause therein pending wherein
8 Will Holloway is plaintiff and the Choctaw Oklahoma and Gulf Railroad Company is defendant to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Now if the said Choctaw, Oklahoma and Gulf Railroad Company, your petitioner, shall enter in the said Court of the United States on the first day of its next term, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this—— day of ——1901.

(Signed) CHOCTAW, OKLAHOMA AND GULF RAILROAD CO.
By E. B. Pierce.
E. B. PIERCE,
J. W. McLOUD,
Sureties.

Filed in open Court Feby. 7th, 1901. W. T. Couch, Clerk. By J. D. Shute, D. C.

State of Arkansas,
County of Lonoke.

I, W. T. Couch, Circuit Clerk, in and for said county, hereby certify the above and foregoing to be a full true and correct copy of the record and the whole thereof, in the above entitled suit heretofore pending in said Circuit Court, being numbered 1082 wherein Will Holloway is plaintiff and the Choctaw, Oklahoma and Guif Railroad are defendants said record con-

sisting of the complaint filed by said plaintiff in said
9 suit on the 10th day of November, 1900, the summons and return thereon filed in said suit on the 10th day of November, 1900, the petition for removal of said [said] suit to the United States Circuit Court filed by said defendant in said suit on the 7th day of Feby., 1901, the bond on removal of said suit to the United States Circuit Court, filed by said defendants with said petition on the 7th day of February, 1901, and the order of removal of said suit to the said United States Circuit Court entered of record in said suit on the 7th day of Feby. 1901, all as appears on the files and of record in my office.

Witness my hand and official seal this 18th day of Feby. 1901.

(Signed) W. T. COUCH, Clerk.

[Seal] By J. D. Shute, D. C.

Fee Bill.

W. T. Couch, Clerk.....$2.50
A. J. Walls, Sheriff..... .60
Transcript 3.00

Filed, March 29th, 1901. W. P. Feild, Clerk.

10 United States of America.
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 22nd day of October, Anno Domini, one thousand nine hundred, at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said Court, the following proceedings were had, to wit, March 29th, 1901.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the defendant by J. W. McLoud and E. B. Pierce, Esqs., its attorneys and files herein its transcript on removal from the Circuit Court of Lonoke County, Arkansas, and also its demurrer to the complaint therein contained.

Which demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Demurrer.

Comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company and demurs to the complaint of the plaintiff herein and for cause says:

11 That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that judgment be entered in its favor upon said complaint, and that defendant be dismissed with all its costs.

((Signed) J. W. McLOUD,
E. B. PIERCE,
Attorneys for Defendant.

Filed March 29th, 1901. W. P. Feild, Clerk.

12 United States of America.

Western Division of the Eastern District of Arkansas.

Be it remembered, that at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 1st day of April, Anno Domini, one thousand nine hundred and one, at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said court, the following proceedings were had, to wit: April 6th, 1901.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House, Esq., his attorney and by leave of court files herein his amended and substituted complaint. Which amended and substituted complaint is in words and figures following, to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

On this day comes the plaintiff Will Holloway, and for amended and substituted complaint herein states that
13 the defendant is a corporation and operates a railroad in this State, and that on the 27th day of October, 1900, he was employed by the defendant company as a fireman; that on the 29th day of October, 1900, he entered upon his duties as such fireman, and began work for the defendant as such, and that on the 31st day of October, 1900, he was engaged in his duties as such fireman, and that, on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Arkansas, and while there the said W. H. Davis, and the plaintiff received orders from their superior officer, the Chief Night Dispatcher or Train Master, of the defendant company at Little Rock, Arkansas, who has exclusive control of the movement of all trains and engines at about 11 o'clock at night, directing them to back up the Switch Engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about sixty miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of men were at work repairing the road bed, was ditched and disabled; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the head-light would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but this request was refused, and they were directed by said Chief Night Dispatcher or Train Master, at Little Rock, to back said engine down to Hulbert, a distance of about sixty miles in the night time as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience
14 to such directions, they continued to run said switch engine backward until the reached trestle No. 547, a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the tank or tender and the engine and was thereby seriously and permanently injured, as follows, to wit:

Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he has suffered continuous and excruciating pain both in mind and body ever since, and he continues so to suffer; that the said broken ribs, bruised and lacerated kidneys and other bruises, lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company that by reason of said injuries he has been permanently disabled, and at that time he was 33 years old, and was earning about $80.00 per month; that the said negligence of the defendant company consists in this, to wit:

1st. In directing the said Davis and this plaintiff to run said switch engine consisting of an engine and tank or tender, backwards in the night time when it was dark.

2nd. In not providing for and having a head-light on the back of said engine.

3rd. In not placing a man on the footboard in front of said engine with a white and red light, as required by the rules of said defendant company, as required by law.

4th. In not providing for and furnishing said engine
15 with a pilot or cow-catcher.

5th. That said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights. It was a square or box engine, that is, the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

6th. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say when the air was applied to the brakes, those on the tank or tender in front of the engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine in fact there were no shoes on the brakes of the engine and when the engineer discovered the horse on the track he immediately applied [to] air to the brakes so as to stop the engine and tank or tender, as soon as possible, the brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine, thus the engine was

forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender, closer together, and as the plaintiff was attempting to escape by going out
16 between the ends of the engine and tank or tender, he was caught between the same and thereby injured as aforesaid, that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes.

7th. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman, and with a reasonably safe place to perform such work, and it had failed so to do in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence above stated, the plaintiff has suffered the injuries above mentioned, and has suffered therefrom long, intense and excruciating pain both physical and mental, and has thereby been damaged in the sum of Ten thousand dollars.

He further states that by reason of said injuries caused by the neglect of the defendant as above stated that he has been forced to make a medical and doctor's bill in the sum of about One hundred and fifty dollars.

Wherefore he prays judgment for the sum of Ten thousand dollars on account of said injuries, and the sum of One hundred and fifty dollars for his medical and doctor's bill and for such other and further relief as he may be entitled to.

(Signed) J. W. HOUSE and
M. HOUSE,
Attorneys for Plaintiff.

State of Arkansas,
County of Pulaski.

Will Holloway states that he is the plaintiff in the above entitled cause, and that he believes the statements in the foregoing amended and substituted complaint are true.

(Signed) WILL HOLLOWAY.

Subscribed and sworn to before me this 5th day of April, 1901.

D. H. CANTRELL,
Notary Public.

Filed, April 6th, 1901. W. P. Feild, Clerk.

17 And on April 25th, 1901, the following proceedings were had to-wit:

Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the defendant by E. B. Peirce, Esq., its attorney and by leave of court files herein its answer to amended and substituted complaint.

Which answer to amended and substituted complaint is in the words and figures following to-wit:

18 In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.

April Term, 1901.

Will Holloway, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Answer of Defendant to Amended and Substituted Complaint.

Now comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company, and for answer to the complaint of the plaintiff herein says.

That it is not true, as alleged in plaintiff's complaint, that plaintiff and said engineer Davis were ordered or directed by the Chief Train Dispatcher or Trainmaster, or any one else, to run said engine and tender backward from Brinkley to Hulbert as alleged in plaintiff's complaint, but admits that the said Davis as engineer and this plaintiff as fireman left Brinkley at 11:17 on the night of October 31, 1900, with switch-engine No. 3, backing the same east in the direction of Hulbert; admits that they continued to run said switch engine backward until they reached trestle No. 547 where they ran upon and collided with a horse upon the said trestle (whether with or without fault on their part, this defendant has no knowledge or information sufficient to form a belief) and said switch engine was thereby derailed and that plaintiff was injured to some extent; but denies that two or more ribs were broken, his kidneys were bruised and lacerated, and that he received bruises, lacerations and injuries from which he has suffered continued and excruciating pain both in mind and body ever since, and he continues so to suffer; denies that by reason of said injuries he has been permanently disabled and that he was thirty-three years old and was earning eighty dollars per month; denies that the alleged broken ribs, bruises and laceration of kidneys and other bruises, lacerations and injuries were all received by him on account and by reason of the negligence of the defendant company; denies that the defendant company was negligent.

1st. In directing the said Davis and this plaintiff to
19 run said switch-engine, consisting of an engine and a tank or tender, backwards in the night time when it was dark, and denies that said Davis and plaintiff were so directed.

2nd. Denies that it was negligent in not providing for and having a head-light on the back of said engine.

3rd. Denies that it was negligent in not having a man on the foot-board in front of said engine with a white and red light as required by the rules of said defendant company and as required by law, and denies that there is such a rule of the company or such a requirement of law.

4th. Denies that it was negligent in not providing for and furnishing said engine with a pilot or cow-catcher.

5th. Denies that it was negligent because said engine was a regular road engine except it had foot boards at each end for a man to stand on with lights, and because it is a square or box engine, or the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

6th. Denies that the brakes of the engine were out of repair and could not be worked or used at the time of the injury aforesaid as alleged in plaintiff's complaint, and in respect to said brakes this defendant alleges that said engine had no brakes whatever on the engine, admits that the brakes on the tender or tank were in good working condition, denies that the effect of applying the brakes on the tender was to stop the tank or tender in front or east of the engine and by reason of the alleged defect in the brakes on the engine the engine was forced with all of its weight and momentum upon or against the tank or tender, thereby bending the gooseneck and breaking the draft castings between the engine and tank or tender (which defendant denies was also defective and out of repair) and bringing the ends of the engine and the tank or tender together, and as plaintiff was attempting to escape by going out between the ends of the engine and tank or tender he was caught between the same and was thereby injured as aforesaid, and denies that plaintiff had only been on said en-
20 gine for a few hours, and denies that he knew nothing of the condition of the brakes.

7th. Defendant denies that it has failed to comply with any rules of law or contract with the plaintiff by which it was in duty bound to furnish him with reasonably safe instrumentalities, machinery and appliances with which to work as such fireman and a reasonably safe place to perform such
21 work, and denies that it has failed so to do in the particulars above named or in any particulars named in

plaintiff's complaint, and denies that by reason of said failure to perform its duty as alleged in plaintiff's complaint, and by reason of the negligence therein stated, the plaintiff has suffered the injuries above mentioned and has suffered therefrom, intense and excruciating pain, both physically and mentally, and has thereby been damaged in the sum of ten thousand dollars, or in any other sum.

Defendant further answering, denies that by reason of said alleged injuries caused by the alleged neglect of the defendant as above stated plaintiff has been forced to make a medical and doctor bill in the sum of about one hundred and fifty dollars.

Defendant further answering, states that it has not been guilty of negligence in any respect, manner or degree in producing the injuries complained of by said plaintiff. Defendant alleges that if the injury is due to carelessness or negligence on the part of anyone, that it is due entirely to the carelessness and negligence of the plaintiff himself, and that the injury, if any, is the result of a risk assumed by said plaintiff, and for which defendant is in no respect liable to plaintiff.

Wherefore, having fully answered, this defendant asks to be dismissed with all of its costs.

E. B. PEIRCE,
Attorney for Defendant.

Filed April 25th, 1901. W. P. Feild, Clerk.

And on May 6th, 1901, the following proceedings were had to wit:

22 Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House and Menafee House, Esqs., his attorneys and comes the defendant by E. B. Peirce, Esq., its attorney and the parties announcing themselves ready for trial thereupon came a jury, to wit:

J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper, and W. P. Johnson, being twelve good and lawful men of the district who were duly tried, empanelled and sworn well and truly to try the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence; thereupon the jury proceed to hear the evidence as well on the part of the plaintiff as of the defendant, and the trial hereof not being concluded the same is continued until to-morrow morning at half-past nine o'clock.

23 And on May 7th 1901 the following proceedings were had to wit:

Will Holloway
5186 vs.
The Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House and Menefee House, Esqs., his attorneys and comes the defendant by E. B. Peirce Esq., its attorney and come the jury to wit:

J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper and W. P. Johnson and the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence and argument of counsel and having been charged and instructed by the court retired to consult of their verdict.

Which charge of the court to the jury is in the following words to wit:

Gentlemen of the jury:

This is an action to recover damages for injuries alleged to have been sustained by the plaintiff while in the employ of the defendant railroad company, in an accident alleged to have been caused through the negligence of the railroad company. In actions of this kind the liability of a railroad is quite different from that in case of a passenger. The law governing the liability of a railroad for injuries sustained by an employe is that of master and servant. There is no greater liability assumed by a railroad toward its employes
24 than that of any other employer, whether a corporation or an individual. The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to furnish its employes working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that then it has discharged its duty, and in case of accident to one of its employes, it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with the tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.

The burden of proof to establish the fact that the plaintiff was injured and that the injury occurred by reason of the negligence of the defendant, is on the plaintiff, and he must establish both of these facts by a preponderance of the evidence. The mere fact that he was injured while engaged in the service of the defendant is not sufficient to entitle him to

a verdict; he must also show that he sustained the injury by reason of the defendant's negligence. Negligence in cases of this kind consists in the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the emplover, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover although he may have been injured very se-
25 verely.

The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleegd injuries were sustained, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without any headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person under all the circumstances, should have known the fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.

That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience if the least reasonably prudent, was bound to have noticed it, espe-
26 cially after riding on it and acting as fireman for a trip of 58 to 60 miles.

This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact, he undertook the trip, then he cannot recover and your verdict should be for the defendant, without considering anything more.

But if you find the facts otherwise, i. e., that he did not know this or could not have known it as a reasonably prudent person, then it will be necessary for you to determine other facts. In this connection I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time he cannot close his eyes to obvious defects, and will be charged with such knowledge of defects if they were patent and apparent to a man who for a number of years has been a locomotive fireman.

Now the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff [recovered] his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this
27 action, and your verdict should be for the defendant.

On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff, and Davis, the engineer.

The plaintiff testified, that, while he did not see the horse that caused the accident, the engineer called to him, "Look out, look out;" that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine, had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes, caused the accident whereby plaintiff was injured. On the other hand, the engineer testifies that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the

locomotive was running backward; that there was no light in front; that the engineer kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact, whether if there had been brakes, the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and
28 that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant.

If your verdict is for the plaintiff on these issues, the next thing for you to determine is was he injured in this accident; if you find he was, then he is entitled to compensation, as I shall fully explain to you, but if you find that he was not injured in that accident, he is of course, not entitled to any verdict.

The measure of damage, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident; next the loss of wages during the time that he has by reason of these injuries, been incapacitated from doing any work, next, if the jury find from the evidence that the plaintiff by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured, and what they think he will earn in his present condition, making such allowance for such time hereafter, as, in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning, as much as he would without the injuries sustained by the accident. The tables showing the probability of his life which have been introduced are not conclusive, but may be considered by you, with such other facts as your good sense and judgment tells you to use for the purpose of determining for how long, if at all, the plaintiff should receive such compensation. You may allow him compensation for the pain and suffering, if any caused by this accident. This pain and suffering includes both mental
29 and physical. The amount of such compensation must be determined by you, as neither the law nor any person

can fix an exact basis for compensation for pain and suffering. Such a matter is left to the good judgment of the jury, who must act as reasonable men, without any favor or prejudice.

While it is hardly necessary for me to mention this fact to you, yet it will do no harm to say to you that, in determining what your verdict shall be in this case, you are not [a] to be influenced in any wise by the fact that the defendant is a corporation or railroad company, nor the plaintiff is a working man and perhaps in needy circumstances. The law knows no distinction between rich and poor, high and low. Your duty is to render a true and correct verdict according to the law and the evidence regardless of any one's standing, and uninfluenced either by sympathy or prejudice. If you do that your verdict is a just one; if you do not it is an unjust one.

You may retire and consider of your verdict.

And on May 8th, 1901, the following proceedings were had, to wit:

Will Holloway
5186. vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Comes the plaintiff by J. W. House, and Menefee House, Esqs., his solicitors, and comes the defendant by E. B. Peirce, Esq., its attorney and comes the jury, to wit:

30 J. C. Rogers, Jack Barnett, Jobe Hyde, J. K. Brantley, J. S. Tucker, J. D. McLaughlin, M. Watson, R. Wood, J. A. Carpenter, W. S. Veazy, Robert Harper and W. P. Johnson and return into court the following verdict:

"We, the jury find the issues for the plaintiff and assess his damages at the sum of sixteen hundred dollars ($1600.00) (Signed) Jobe Hyde, Foreman.

It is therefore considered, ordered and adjudged that said plaintiff Will Holloway, do have and recover of and from said defendant Choctaw, Oklahoma and Gulf Railroad Company the said sum of sixteen hundred dollars ($1600.00) found as aforesaid together with all his costs herein expended and have execution therefor.

The following endorsements appear upon the margin of the record:

May 18th, 1901, J. W. House, claims a lien on this judgment for $800.00 for services rendered.

May 18th, 1901, $700.00 of the judgment assigned to W. G. Faucett and Bro., (see assignment with papers.)

May 18th, 1901. $100.00 of this judgment assigned to J. W. House, see assignment on file with papers.

And on June 22nd, 1901, the following proceedings were had, to wit:

31 Will Holloway
5186 vs.
Choctaw, Oklahoma and Gulf Railroad Company.

Now on this day comes the plaintiff by J. W. House, Esq., his attorney and comes the defendant by E. B. Peirce, Esq., its attorney and said defendant presents here its bill of exceptions, which being found correct is now signed, sealed and made a part of the record herein; and said defendant by its said attorney also files its petition for writ of error and its assignment of errors which is by the court allowed; and said citation and writ of error are issued and service of the same are acknowledged.

And it is ordered by the court that upon the execution and filing of a bond with good and sufficient sureties by the defendant in the sum of Twenty-five hundred dollars conditioned as required by law, and when approved by the judge of this court the same shall act as a supersedeas bond on the judgment rendered herein. Thereupon said defendant presents its bond in the sum of Two thousand five hundred dollars which is approved by the court, and it is ordered that the judgment rendered herein be superseded.

Which Bill of Exceptions is in the words and figures following:

32 United States Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Bill of Exceptions.

This cause coming on for trial on the 6th day of May, 1901, the plaintiff, to sustain the issues on his part, introduced the following testimony, to-wit:

Dr. Edwin Sharpe, a witness for Plaintiff, testified as follows:

Q. Where do you live? A. North Little Rock.
Q. How long have you been living there?
A. I have been living there nearly four years.
Q. What is your business or occupation?
A. Practicing medicine.

Q. How long have you been practicing medicine?

A. Since 1881.

Q. Have you been continuously in the practice since you came to Little Rock? A. Yes, sir.

Q. Do you know the plaintiff, Holloway? A. Yes, sir.

Q. I will ask you if along about the 31st of October last year, 1900, you were called to see him as a physician?

A. Yes, sir.

Q. Now, please state, doctor, fully all the conditions that you found him in at the time you were called to see him?

A. Well, he was suffering from his back—the left side of his back—about the region of the kidney. He had evi-
33 dences of bruises on the left side more particularly, and he was passing some blood, suffering considerable pain, and also in his left leg—rather impaired the usefulness of his left leg for quite a while and up until now, and while there was no abrasion, the parts were bruised considerably and the two lower ribs on the left side, floating ribs, appeared to be fractured.

Q. You say he passed blood? You mean through his urine?

A. Yes, sir, then he spit up some.

Q. How long did that blood continue to pass through the urine as well as you remember?

A. Well, I don't remember exactly. At intervals, it would check and then it would recur. I don't remember just exactly how long, for several weeks.

Q. What would that indicate, the passage of blood through the urine?

A. Well, sir, it would indicate an injury of the bladder or kidney and urethral canal. In this case, the evidence of injury was over the kidney and none about the bladder. That would evidence the fact that it was from the kidney.

Q. Has he been under your treatment since then?

A. Yes, sir.

Q. Just state what is his condition now?

A. Well, he now suffers from the back of his neck and head and the muscles of the back and the seat of the injury, and from the left leg—the left hip and leg mainly.

Q. Now, give your opinion, as a physician, are these pains that you now speak of, produced from the injury that he received at the time?

A. Well, I don't know of anything else to which they might be traceable.

Q. Then it is your opinion that they do result from these injuries? A. Yes, sir.

Q. Now, how long did he remain in bed before he
34 was able to be up at all?

A. Well, I don't remember the exact number of days, several though, I think, maybe as long as 18 or 20 days. I don't know when positively.

Q. Well, doctor, what will be the probable result, as far as you could give it, to your best judgment, as to the result of these injuries?

A. Well, sir, I can't tell about that. I couldn't tell what will be the duration of these injuries. It might be permanent; it might lead on to something else; I can't tell; it might subside after awhile, but to say how long they will continue, I couldn't say. I don't know.

Q. Is it probable that they may continue permanently or not?

A. Well, yes, sir; that is, for a considerable length of time, at least.

Q. I will ask you whether the kidney are considered vital parts to the human system? A. Yes, sir.

Q. In what way may an injury or bruise or laceration to the kidney affect him?

A. Well, it might impair the function of the kidney and destroy the power of performing their duty in the economy; that would affect them permanently; and it might be that the injury might after awhile produce a low grade of inflammation that might after awhile go on to suppuration, make an abcess, from that blood poisoning, something of that sort. You couldn't tell just exactly

Q. Now, doctor, from the way you found him, and his condition now, and from your knowledge of the course that the trouble has taken from the time you were first called to the present time, in your judgment will he be able to follow out the profession of fireman where he has to shovel coal and where he has got to have the use of his back?

A. Well, I thould think not any time soon at least.

Q. He has been under your charge since that time, has he not? A. Yes, sir.

Q. What would be a reasonable compensation for your services as a physician from the time he was injured up to this time?

A. I should think $100.00. I don't know what might be the necessity for treatment of his case hereafter. It might be a great deal more hereafter than it has been. It might not be anything.

Cross-Examination.

Q. It is largely speculation, is it not, as to what the result of an injury of that kind will be?

A. Well, it is somewhat in that light, yes sir.

Q. He might recover, might he not?

A. He might, yes sir.

Q. Entirely? A. Yes sir.

Q. He might recover in a reasonably short time, mightn't he?

A. Well, from the length of time that he has been afflicted, it is hardly probable.

Q. It is not impossible? A. No sir.

Q. You have known a great many phenomenal things in the way of healing up diseases and things in your experience?

A. Yes, sir.

Q. These pains that you speak of in his side and neck now; these are merely symptoms that you get from him, that he tells you that he is suffering from?

A. Well, not entirely. Of course, they are more or less.

Q. You are relying largely upon what he tells you about it?

A. In a measure. Of course, I can tell something about these things by certain localities eliciting pain by pressure.

Q. But after all, you are just relying upon what he says about the extent of the pain?

A. In part, I am, yes sir. We can't see a pain. We have got to rely upon what the patient says about that.

36 Will Holloway, plaintiff, being duly sworn, testifies as follows:

Q. You are the plaintiff in this suit? A. Yes sir.

Q. What business were you engaged in on the 30th of October, 1900?

A. Locomotive fireman Choctaw, Oklahoma & Gulf.

Q. That is, for the defendant in this suit? A. Yes sir.

Q. How long had you been engaged as fireman in the service of that company?

A. I was called to leave on Monday morning at one o'clock —on the 29th.

Q. What experience have you had as a fireman?

A. I have had quite a lot of experience as a fireman on the St. Louis, Iron Mountain & Southern Railway.

Q. How many years?

A. I was there the last time a little over ten months, I think, and I was there a little over a year before, and I was on the Houston & Texas Central over two years.

Q. When you quit the Iron Mountain, were you discharged, or quit of your own accord?

A. Quit of my own accord. I have a clearance in my pocket.

Q. The contract was made on the 29th of October, was it?

A. The contract—I think my application was made out about the 25th or 26th. I was called to go out—I am not sure about that, what day it was—it was somewhere on Saturday or Sunday.

Q. (Counsel for Defendant): 23rd is the date of your application? A. Yes sir.

Q. (Counsel for Plaintiff): When you were called out to go to Brinkley, after you went to Brinkley from here, did you come back any more?

A. No sir. I didn't come back here any more. They turned us at Brinkley and sent us back. We left here
37 and stopped at Brinkley; that is the terminal of the local division.

Q. What time did you make your first trip?

A. On Monday morning. I was called to leave on Monday morning, the 29th, at one o'clock, called at one to leave at two.

Q. In the night-time? A. Yes sir.

Q. You went from here to what point?

A. From here to Brinkley.

Q. From Brinkley, where did you go?

A. To Hulbert.

Q. What time did you go from Brinkley to Hulbert?

A. We were called to leave the next morning at one o'clock, and left Brinkley at two, going east still.

Q. You went from there to Hulbert, did you? A. Yes sir.

Q. Brinkley is about the middle division between this and Memphis? A. Yes sir, local division.

Q. How far is it from Brinkley to Hulbert, still further east? A. About sixty miles.

Q. Then Hulbert is this side of Memphis?

A. Yes sir, about nine miles over to Hopefield.

Q. Did you get to Hulbert before day?

A. We left there in the morning, and we had nearly daylight all the way down to Hulbert from Brinkley, yes sir.

Q. When were you ordered back?

A. We left Hulbert, I think, at 1:01, we registered out of Hulbert for Brinkley with engine 3.

Q. You mean in the afternoon? A. Yes sir.

Q. Did you bring the same engine back that you carried down?

A. No sir, we carried down 33 C., O. & G. and came back on W. & B. 3.

Q. Had you ever seen this engine No. 3 W. & B. before?

A. No sir, not until I had orders to change at Hulbert.

Q. You started back there from Hulbert at about
38 one o'clock in the afternoon of the 30th? A. Yes sir.

Q. You were ordered to what point?

A. Ordered to Brinkley.

Q. Was there any train attached to the engine and tank or to the engine?

A. No sir, nothing at all—running light.

Q. You then merely ran the engine from Hulbert to Brinkley? A. Yes sir.

Q. And when you got to Brinkley, what orders did you have?

Q. We had orders there to back up from Brinkley to Hulbert.

Q. What time did you receive these orders?

A. Received these orders—we registered in there at seven something, and I think, somewhere about ten o'clock, we received these orders.

Q. It was in the night-time? A. Yes sir, in the night.

Q. What was done then?

A. Well, on first coming into Brinkley, we were told when we got there that we had to back up to Hulbert; well, we got off and went and got our supper at the Arlington Hotel across the street, and after we came back from supper, Davis and I walked up to the office door and he says, "Come on and let us go back and see if we cannot get that operator to let us turn that engine." I said, "All right," and we waited a few minutes, and he spoke to the operator and said, "What did he say?" He said, "Wait a minute and I will tell you."—he was waiting on some other message, I suppose, at the time. I turned and walked off and said "Davis, I will go get my engine ready to go out. I had my lights to fix, ash pan to clean and to get everything ready to [do], and in a short time, Davis came out to the engine, said, "Here is what I have got," and I said, "What is it?" and he handed it over and it was just wrote across a blank telegraph form sheet and across that sheet, the dispatcher said he didn't want the engine turned.

Q. Then I understand you, when you were ordered
39 to back the engine from Brinkley to Hulbert, through the operator—was that the operator at Brinkley?

A. Yes sir.

Q. You requested their permission to turn the engine?

A. Yes sir, we asked permission to turn it more than once.

Q. And then as you came back from supper, was Davis, the engineer, in charge of the engine? A. Yes sir.

Q. As you came back up there, you inquired what about it, and he told you he would let you know in a minute?

A. Yes sir.

Q. And that telegram that Davis exhibited to you, and you read, in effect, was that they didn't want the engine turned?

[A.] The sum and substance of it was that they didn't want the engine turned? A. Yes, sir.

Q. It is agreed Mr. Holloway, you left Brinkley under these instructions? A. Yes sir.

Q. The engine you were instructed to back down to Hulbert was the same one you had brought up from Hulbert?

A. Yes sir. There were but two engines in the play—engine 33 we left here on and left at Brinkley, and then we took 3 out of there.

Q. The engine you were hurt on is described as W. & B.?

A. Yes sir.

Q. That was the engine, W. & B., 3, that you started to Hulbert on in the night time, under the direction of the dispatcher? A. Yes sir.

Q. How far did you go?

A. Somewhere between twelve and fourteen miles.

Q. About what rate of speed were you going?

A. Between seven and eight miles an hour.

Q. What did the engine consist of?

40 A. The engine and tank.

Q. You went between twelve and fourteen miles, what happened then?

A. Well, we were going down about 3 1-2 miles this side, or perhaps 4 1-2 miles this side of Palestine Station, and Davis says to me, "There is a road crossing here some place, but I don't know exactly where it is at," and I said, "That is all right, I will get up and ring my bell and if there is anybody here, they will hear us coming," and I had got up on my seat and was ringing the bell, and after we passed above the crossing, I just fell off of the seat and commenced putting coal in the fire box and the top hinge of my door was broke off and I couldn't swing it open with my chain. I had to pick it up and set it over on a latch, and then pit it up and set it back here—it was a regular old scrap pile we were on any way. I was putting my fire in and Davis was looking out, and the first thing you know he yelled out to me to lookout, and I had my face right out of the fire box and of course, I was blinded, the fire was perfectly white in the fire box, and I shut my door and hit to get out, and my intention was to step out backward and put my foot on the step and catch myself the way the engine was going, to keep from falling, and as I stepped back, he applied the air, threw the air into the emergency, gave her all the power she had to stop her, and in an instant, it struck the horse. Well, this tank and engine all bungled up together and caught me as I went to get out. I hallooed to him to release his air, I was caught, and he released his air and that caused the tank to separate, and I fell and dropped right on my knees in the tank, and as quick as I hit the tank floor, I left it flying, just as fast as I could get out of it. I went off in the brush.

Q. The first knowledge you had of any obstructions, you heard Davis halloo, "Lookout! Lookout!" A. Yes sir.

Q. What did Davis do immediately?

A. He applied his air.

41 Q. About how far, according to your judgment, did the car run before it struck the horse, after Davis hallooed, "Lookout! lookout?"

A. Why, anywhere, from 50 to 75 feet. I couldn't say exactly; that is only a matter of guessing, but I suppose somewhere between 50 and 75 feet.

Q. You say you were engaged at work, putting in a fire, when he hallooed, "Lookout," you closed the door as quick as you could, and when you straightened up, at that time, had the car struck the horse then?

A. No sir, it hadn't struck the horse. As I turned my back it hit the horse.

Q. You turned back and was attempting to get out?

A. Yes sir.

Q. You think then it must have been anywhere from fifty to seventy-five feet from the time he hallooed "Look out, Look out?"

A. Yes, sir, it must have been from 50 to 75 feet.

Q. I will ask you what effect it had on the car? What about the gooseneck?

A. Well, it is, in one sense of the word, it is a draft casting. I am a truck and tank builder in the Iron Mountain shop here, built many a one, and they are generally known among a great many men as chafing irons; that is, the two irons that play between the tank and engine; the chafing iron on the tank was broke into four pieces and judging from the way the engine got back over that one, the goose neck was bound to have bent to let it over, it being an iron both under the engine and under the tank.

Q. How far apart was the end of the engine from the end of the tank when they were in motion?

A. The standard runs from 20 to 20 1-2. 19 to 24 inch cylinder engines—Rogers—they are generally 20 or 20 1-2 inches.

Q. That would be the distance between the ends, they are coupled with this goose neck; this goose neck enters into what you call the brass casting? A. Yes sir.

42 Q. That space in there would be from 18 to 20 inches?

A. Yes sir, 19 to 21 1-2.

Q. You say as you were attempting to get out, that came so close together it caught you? A. Yes sir.

Q. What part of the body did the two strike you?

A. They got me right across here, (indicating the region of the hips and kidneys).

Q. How far apart, according to your best judgment, were the two ends from each other when you were caught between them?

A. Why, I shouldn't think, they way I was in there, it was over six or eight inches.

Q. You said while ago that you hallooed out to Davis that you were caught, and what did he do then?

A. I told him to release his air.

Q. Did he do that? A. Yes sir.

Q. What was the effect of that?

A. The engine being heavier than the tank forced the tank ahead and let me drop down on the floor, right on my knees. [Q.] Yes sir, I got out, and another section of the train was coming down upon us, and saw the headlight coming, I got up, I was spitting blood, and I knew I was hurt, as far as that is concerned, but under the book of rules I was working under, I was compelled to do my duty as a fireman, and the book of rules says where there is no brakeman to protect that train, the fireman must protect it.

Q. What did you do immediately after you got out?

A. I flagged the coming train.

Q. How far back did you go?

A. I went, I suppose, 100 yards.

Q. With your lantern? A. Yes sir.

Q. What did you do then?

A. I flagged these boys and waited until they come up, and coming along back down there, I told Davis I still
43 saw where that old horse run; he come right down the track ahead of us, and then, of course, I came on back to my engine.

Q. When did you come back to Little Rock, and how did you come?

A. Well, they got the wreck cleared the next morning, I think, about 6:30, and we asked them to let us come in. Davis sent a message here, I told him to send it; that I wanted to get some place where I could get attention, I was spitting up blood, and I knew I was hurt, I didn't know how bad, I wanted to get some place where I could get something done for me; it didn't seem they were making preparations to assist a man at all, I had to lay there and the passenger train was late; it was 1:40 when it left Palestine, and came in here about 4:40.

Q. You were there?

A. I waited from 12:40 until about 1:30 on the 31st, from the morning to the evening.

Q. You came back, what did you do then?

A. I came back here and got a doctor as quick as I could get one.

Q. Just state to these gentlemen about how you were injured, as well as you can, the effect of it and how you suffered and all about it?

A. Well, I was caught between the tank and the corner of the caboose that projects out and makes a gangway where we get in and out, and the engine had no brake on it, and judging from the distance—

Q. Well, tell about that. You say the engine had no brakes on it, when did you first find out that the engine had no brakes on it? A. After we were into the wreck.

Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?

A. No, sir, I have no right to inspect an engine; I am no engine inspector; I am a locomotive fireman.

Q. When was your attention first called to the fact that the shoes were not at work on the wheels?

A. Why, after she went down there and didn't stop,
44 after he applied his air, she rolled down, and I got off and told him none of these shoes ever clasped the wheel; he said no.

Q. Did you know at that time there were no brakes on the engine at all?

A. No, sir, I didn't know it until I read it in the answer to our complaint. That was the first I knew of it at all.

Q. Now, you may state the extent of your injuries, and the extent of your suffering, and how you have felt since, and how you feel now?

A. Well, I was in bed the principal part of the time for about thirty days. I was there for 27 or 28 days, and the doctor finally told me, "I want you to get up, if you can, and walk around, and see if you can't get a little strength," I had fallen off so, and I was hurting through the small of my back and kidneys and side where I was caught and pressed in, and the water that I passed was very near blood, and for quite a long time afterwards, and also spit up blood frequently, and I suffered from the time that I was hurt until now, and am being treated by the same physician, and expect to be until I get well, or make the best of it in some way.

Q. Describe to the jury how you are affected now?

A. I am affected on my left side entirely from the base of my skull this side down the entire left side, through the small of the back, the seat of the pain being here in the region of the kidneys.

Q. Why do you use that stick?

A. I use it because I am down on one side. I can't get along.

Q. I will ask you what was your condition physically before you had these injuries?

A. Away above the average man for strength and health.
Q. Had you ever had any sickness before?
A. Never had but one spell of sickness in my life; had the penumonia in 1879.
Q. You were then a stout man at the time of the injury?
A. Considered as good a man as the Iron Mountain had, yes, sir.
Q. About what were you earning at the time of your injury?
A. Well, according to the way that I was going out
45 there, I was earning right up at the neighborhood of $90 a month.
Q. You were working up at the Iron Mountain. About what is the amount of wages that a fireman of your experience would ordinarily get?
A. The firemen on the Iron Mountain?
Q. I don't mean on the Iron Mountain, but what would the wages of a fireman ordinarily be per month?
A. Well, any kind of a fireman ought to average $80 a month.
Q. According to the wages that you had started out there, how much would that amount to a month?
A. The wages I started out would amount to over $90 a month.
Q. Did you ever do any other work on the railroad besides fireman? A. Yes, sir, been brakeman.
Q. Is the fireman a higher grade than the brakeman?
A. Different lines altogether. One is in the transportation department, and the other in the locomotive department.
Q. You had been transferred from the department of the brakeman?
A. I quit braking on account of that wrist, and went into the shops, into the locomotive and cab department, truck and tank builder on the Iron Mountain, worked in there quite a while and then went out on the road as fireman.
Q. Then, at the time you were injured, you think you were earning from $80 to $90 a month, and a fireman is worth about that much a month? A. Yes, sir.
Q. What was your age at the time you were hurt?
A. Thirty-three years and twenty-four days old.
Q. Have you been able to do any work since then?
A. No, sir, I have not.
Q. Have you done anything since then? A. Not a lick.
Q. Have you been able to perform any kind of labor?
A. No, sir, nothing at all, on account of not being able to stoop over.
46 Q. Was there anyone else on that engine, besides you and Davis, the engineer? A. No, sir, no one at all.

Q. From whom did you get engine No. 3 when you got it at Hulbert?

A. Received it from the traveling engineer, and Mr. Waters, the engineer in charge. I received it from the traveling engineer.

Q. Where did you start with the engine at that point?

A. He said that engine 3 was going to the shop for repairs, as she had worn out all her brasses and pony trucks ahead, and he used car brasses there for a makeshift, and the hose on the left side from the tank to the injector was bursted and I wrapped that with some old bagging, and her blower pipe, the valve was off of it entirely and it filled the cab with steam and water. I had a plug in there and kept it wrapped with waste.

Q. That was the tank?

A. Yes, sir, that was the front of the engine; the blow pipe, commonly called the blower, the pipe comes out of the boiler on the engine, comes back under the side of the boiler and goes up in the smoke stack. It is used in starting a fire, where your fire is not burning good; it gives it a draft.

Q. In doing that work, you have already stated that you didn't know that the engine was without brakes?

A. No, sir, I didn't know anything about it, and I never inspected it at all.

Q. Now this defect that you speak about of a certain wheel, was that in the tank or in the engine where you had to fill up the wheel to keep it from getting hot?

[Q.]That was on the engine; the pony trucks run ahead. He told us that he had put some car brasses in there and she would do until we got to the shop; she was ordered to the shop, he told us when we left, and said to watch her and keep her from running hot, and cool her down and repack her, and probably she would get to running cool after she formed a seat in the brasses.

Q. Do you recollect whether there was anything said
47 to the dispatcher in charge at Brinkley about backing the engine onto the train to carry it down?

A. Yes sir, he said for us to go in on the house track and these other boys would pull in on the passing track and we could drop in behind them, and they would couple in behind the air and pull us down there, and we pulled in on the house track and they cut the train in two and was backing down and stopped, and some one called Davis and told him to go to the office. Davis went to the office and said, "Well, we have got orders to go," and I said, "Well, all right," and these fellows then after pushing cars ahead of us, and he asked the conductor to move these cars, and he said, "I have registered out of here and they are in a hurry for this engine, and I want to get it down there."

Q. And so after Davis came back, he said you were ordered to go out?

A. Yes sir, he had the order in his hand and handed it to me, and I read it over.

Q. Now, when you went out, did you go with the tank going east? Which was in front, the engine or the tank?

A. The tank was going east, the engine was west. The engine was backing up.

Q. In coming from Hulbert this way, the engine was fronting west, coming this way? A. Yes sir.

Q. Coming from Hulbert to Brinkley, the engine was fronting west? A. Yes sir.

Q. When you were ordered to go back, or back the engine down to Hulbert, you backed it without turning the engine?

A. Yes sir, we asked permission to turn it, but it wasn't granted us.

Cross-Examination.

Q. Mr. Holloway, how many departments of the railroad did I understand you to say you had worked in?

A. I worked in the Locomotive and Mechanical De-
48 partment, truck and tank department, brakeman and fireman.

Q. Where did you work in these various departments?

A. I worked in three departments in the Iron Mountain shops.

Q. You say you worked in the tank department?

A. Truck and tank builder, yes sir.

Q. You are very familiar then with the methods and the manner in which they are constructed?

A. They are put up on a standard tank, what I mean, a Baldwin or Rogers, something standard.

Q. You can look at the tank of an engine then and take it in [at] a minute? A. No sir.

Q. That is, if there is any glaring defects in it?

A. Well, a tank inspector is a job where it is necessary to have a party to get in under that tank to inspect the wheels.

Q. I mean anything that can be seen just by the tank being out in front of you; you can look at it and take it in in a minute? A. No, I could not.

Q. Well, these things that are perfectly apparent?

A. Well, there is nothing there for a man to see from the outside.

Q. What time was it you say you left Little Rock to go down to Hulbert?

A. We were called at one to leave at two.

Q. That was in the morning? A. Yes sir.
Q. You left at two o'clock?
A. No, we didn't leave at two.
Q. What time did you leave?
A. I don't know what time he registered out. I was over there on the engine.
Q. About what time? A. I suppose 3:00 or 3:30.
49 Q. What time did you get down to Brinkley?
A. It was near noon. I suppose between 11 and 12, when we arrived at Brinkley.
Q. Then how long were you at Brinkley?
Q. We were there until the next morning at one o'clock.
Q. Did you leave Brinkley at one o'clock.
A. No sir, we were supposed to leave at two, but it was about five before we left, on account of the injector of the engine not working.
Q. You left Brinkley at five the next morning?
A. Yes sir.
Q. What time did you get to Hulbert?
A. We got to Hulbert just about noon.
Q. That was the next day after you left Little Rock?
A. That was on the 30th.
Q. You left here on the 29th? A. Yes sir.
Q. Now, how long were you at Hulbert, before you started on your return trip?
A. We registered out of Hulbert at one something.
Q. Of the same day? A. Yes sir.
Q. So that you went down and turned right back?
A. Yes, sir.
Q. It was on this return trip that you took charge of this engine upon which the injury occurred? A. Yes sir.
Q. What time did you get into Brinkley returning?
A. That I am not sure, but I think it was 7:20 when we registered in there.
Q. Then you went to supper? A. Yes sir.
Q. What conversation did you and Davis have about going back? A. Well, I made a "holler" on it.
50 Q. Made a "holler" on what?
A. On going back, backing the engine up.
Q. You did make a "holler?"
A. Yes sir, I did. I said that I didn't want to do it, and asked him to ask the train master to let us turn our engine. There was a turntable right there, and he brought me this message and said that he didn't want the engine turned.
Q. You made a "holler" on it and objected to it, and sent word to the dispatcher to let you turn?
A. Yes sir, but after taking the matter under consideration, Mr. Davis and I had a talk in regard to turning the engine, and it being a case of emergency, I considered if they

wanted me to back the engine up, they would use all the precautions on earth to give me a clear track and clear of all obstructions, and thinking too I could make the trip without any great danger to myself, I agreed to go, they being the master and me the servant. After I took the matter under consideration, I came to the conclusion I could take the run with perfect safety.

Q. You have been reading law since this case came up, haven't you? A. Well, that is not the question.

Q. I just asked you if you haven't been studying the law of this case? A. No sir, I have not.

Q. You mean to tell the jury that you went through all that discussion in your mind?

A. I sat right down on the engine and Mr. Davis and I had that talk?

Q. You swear you went through all that discussion in your mind? A. Something similar.

Q. You objected to going and afterwards you went through a legal discussion of the matter in your mind and then changed your mind?

A. Yes sir, I changed my mind.

[A.] You knew you were going out on a more dangerous business than if the engine was headed forward?

A. Yes, sir I knew it was more dangerous to back up than go ahead, but not so much so that it would be obvious at all.

51 Q. Are you through with your explanation now?

A. Yes sir, I am through.

Q. Did you have any conversation with Mr. Roberts there in the yard about backing the engine up?

A. Mr. Roberts told us on our arrival there that he had asked permission to turn the engine and they said no, before we arrived there. No, he didn't say that. He said he asked them if they were going to turn it and they said no.

Q. I will ask you if you didn't tell the operator there that night or tell Davis, that if you didn't get out of there at once, you was going to bed?

A. I don't remember saying that—no sir, I did not.

Q. Well, is it true or not? A. Well, I couldn't say.

Q. Whether you said it or not, is it true?

A. Well, I wouldn't say. I don't remember what I said. We were quarreling and jowering there for quite a little bit.

Q. Quarreling and jowering about running this engine backward? A. Yes sir.

Q. You don't remember whether you said that if you didn't get out at once you would go to bed?

A. No sir, I don't remember that at all.

Q. How long had you been on the road then?

A. I had been on the road then, at 11:17, 21 or 22 hours.
Q. You had the right to demand rest, didn't you?
A. I had if I wanted it, yes sir.
Q. You could have demanded rest and gotten it at Brinkley? A. I don't know whether I could have gotten it or not.
Q. You had the right to demand it?
A. I don't know whether I have or not on that road. I couldn't say how that is in regard to rest.
Q. You say you didn't know what the rules of the road were? A. I say in regard to rest.

52 Q. So you started out at 11:17. How far did you say you had gone? A. Well, between 12 and 14 miles.

Q. Now, you say that you estimate it was 50 or 75 feet after Davis hallooed before you struck that horse?
A. Something like that, yes sir, to the best of my knowledge.
Q. Don't you know now Mr. Holloway that the engine struck the horse before either one of you knew anything about it? A. No sir, I do not.
Q. You don't know that? A. No sir, I do not.
Q. You state positively then that after Davis hallooed that the engine ran 50 or 75 feet?
A. Something like that, yes sir, as near as I could get at it.
Q. Is seven miles an hour very fast? A. No sir.
Q. If an engine is going seven miles an hour, is it under perfect control?
A. Yes sir, supposed to be under control with proper applications.
Q. Now, which end of the bridge did you strike the horse on?
A. Struck the horse something near the center of the bridge, judging from the scars on the rails there.
Q. How long is that bridge?
A. I couldn't tell you; I didn't measure.
Q. About how long?
A. I walked across it, but I don't have any recollection.
Q. You can form some sort of an idea about how long that bridge is?
A. No, I cannot, because I don't remember anything about it.
Q. But you are undertaking to detail other things that took place. I must insist that you give some idea of about how long that bridge is? A. I have no idea at all.

53 Q. You say you have no idea about how long that bridge was?

A. No sir, I didn't pay any attention to the bridge at all. I was hurt.

Q. You were about the center of the bridge when you struck that horse?

A. Judging from about where the scars, the brake or something had been pulled over, but I never paid any attention to the distance.

Q. What distance can you stop an engine running seven miles an hour?

A. Properly equipped with air, you ought to stop it in two lengths of herself easily.

Q. Suppose an engine is equipped like that one is, how long?

A. I couldn't tell you. I never had any experience before with one equipped like she was.

Q. You don't know how long it would take?

A. No sir.

Q. You allege in your complaint here that the tank was equipped with brakes? A. The tank was, yes sir.

Q. And you allege that the brakes on the tank were in perfect condition, don't you? A. Yes sir.

Q. Now, do you undertake to say that you can ride on an engine from Hulbert to Brinkley and not tell whether there are any brakes on the driving wheels?

A. Yes sir, I didn't pay any attention to it. I have got all I can do when I fire a locomotive to attend to my business, without looking after the engineer's.

Q. When you are firing, what do you look after?

A. I look after my coal, water and lights.

Q. You don't look at anything?

A. I have got no business knowing any machinery at all, because I am not an engine inspector.

54 Q. You just close your eyes to everything else?

A. No sir, I did not.

Q. So far as anything else, you just close your eyes?

A. Yes sir, so far as his work is concerned, it is nothing to me.

Q. I will ask you if there are not a good many grades between Hulbert and Brinkley on the road?

A. I don't remember of but very few grades between Hulbert and Brinkley. No, I don't remember any grades that amount to anything at all.

Q. I will ask you if there is not a good deal of rough track over there? A. Yes sir, it is all rough.

Q. They are doing a good deal of construction work over there? A. Yes sir.

Q. If you are running forward from Hulbert to Brinkley and the brakes are applied to the tender, what effect would be produced then?

A. Produce the effect to slow the train down.

Q. Wouldn't the engine run ahead of the tender?

A. Not supposed to, where it is connected up with safety chains and goose neck.

Q. There is a play in there of 15 or 20 inches?

A. No sir, you are mistaken about that.

Q. Well, what is it?

A. I don't suppose that the play is at the greatest over 2 1-2 or 3 inches at the outside.

Q. When Mr. House had you on the stand, didn't you state there was a play?

A. I said there was a gangway there of 20 1-2 inches from the engine to the tank.

Q. What is the gangway? A. The gangway is an opening.

Q. There is some play though between the engine and tank when it is coupled together? A. Yes sir.

55 Q. I will ask you, when the brakes are applied to the wheels on the tank, if the engine wouldn't jump ahead?

A. The air applied to the tank, with the coal and water on her, nothing but a light train, would be sufficient to hold her perfectly level.

Q. It wouldn't produce a jumping sensation?

A. No, sir.

Q. Well, I will ask you, Mr. Holloway, if there were no brakes on that engine, if that is not a perfectly apparent fact? Where are the brakes located on an engine?

A. Where it is a ten wheeler, they are located on the front.

Q. Well, we are talking about this engine, if it was a ten wheeler or 20 wheeler, or more?

A. Well this was a ten wheeler; she has three drivers on either side. The brakes are located between the two drivers just that way, one applies to each side here, and on the other side the way.

Q. They can be seen perfectly when they are there?

A. Yes, sir, they can be seen.

Q. It is open to the eyes if you look?

A. If a man is on the ground, he can see whether they are there or not.

Q. If he is walking up to the engine to get in it, and he looks, he can see? A. Yes, sir.

Q. Perfectly plain? A. Yes, sir.

Q. So you state now that if the air is applied to the tank, that it wouldn't make the engine sort of jump forward?

A. The weight of the engine is so much greater than that of the tank that it would drag it along perfectly still.

Q. When did you say you first made this discovery about the brakes?

56 A. There at the wreck, where we had the smashup.

Q. Didn't you allege a defect in the brakes?
A. Yes, sir, I said there was a defect in them, I suppose so.
Q. When did you tell Mr. House just now that you made that discovery?
A. Right there at the wreck.
Q. Did you examine it then to see?
A. Yes, sir, I examined to see what was the matter with the whole outfit.
Q. I will ask you, when you filed your original complaint in this suit, why you didn't say something about the defects?
A. Mr. House had charge of that matter.
Q. You didn't allege any defects in the brake?
A. I couldn't tell you what was in it.
Q. You swore to it?
A. Yes, sir, they read it at the time.
Q. You swore to it? A. Yes, sir.
Q. You didn't say anything about any defective brakes?
A. I don't remember what was in it. I read it over.

(Counsel admit that there was no allegation as to defective brakes in the original complaint.)

Q. Now, Mr. Holloway, if there were no brakes on that engine, why would you allege in your amended complaint that the shoes didn't work?
A. Because they didn't work, or was not working at the time.
Q. There wasn't any brakes on there at all?
A. Yes, sir, the brakes were on there.
Q. The brakes were on there?
A. Yes, sir, and hung very low, didn't clear the rail more than an inch and a half after we pulled her back on the track.
Q. Then why do you allege in your complaint that there wasn't any brakes?
A. There was no air connection.
57 Q. You allege in your complaint in the first place that the brakes were defective?
A. Supposed to be.
Q. Then there was an answer filed, in which it was stated that there were no brakes at all on the engine, and then you come back in your complaint and stated that the shoes were defective, if there were any brakes there at all?
Q. You say the shoes were on there?
A. I don't remember about the shoes. The brakes were on there.
Q. You are certain of that?
A. Yes, sir, I am certain of that.
Q. (By the Court): Can the brakes do anything without shoes on to catch the wheel?

A. If it is up tight enough, yes, sir. Of course, the shoe binds and locks.

Q. (Counsel for Defendant): The brakes cannot do anything without shoes?

A. They are not successful, no, sir, but I say you can tighten them up until the brakes will catch.

Q. If there are no shoes on there, it cannot catch?

A. Yes, sir, the brake will catch without a shoe.

Q. But it won't do any good?

A. It will have a tendency to hold as much as it will, but not so much as a shoe, because a shoe is a great deal longer. A shoe is about that length.

Q. Mr. Holloway, what time of night was it you say you left Brinkley going east?

A. Well, I suppose, somewhere about eleven o'clock. I didn't register out.

Q. What sort of a night was it?

A. Well, it wasn't cloudy, thick cloudy, but there was clouds floating over, but it never got thick cloudy until after four o'clock in the morning.

Q. Was it a dark night?

58 A. Yes, sir, it was a dark night.

Q. Was it a foggy night?

A. No, sir, there wasn't any fog, a little mist, but not to amount to anything more than there is in these bottoms all the time.

Q. You made a report to the Company of this accident, didn't you?

A. He asked me some questions there.

Q. Didn't you make out a statement of this injury and furnish it to the railroad company—an accident report?

A. Yes, sir.

Q. I will ask you to examine that, and see if that is the document?

A. That is about the thing of it, yes, sir.

Counsel for Defendant thereupon read the above named report to the jury, as follows:

[59]
Form 267—2M—3-29—1900.

CHOCTAW, OKLAHOMA & GULF R. R. CO.

OPERATED AND LEASED LINES.

REPORT OF PERSONAL INJURY TO EMPLOYES, PASSENGERS OR OTHER PERSONS.

INSTRUCTIONS—A separate blank must be filled out for each person injured, whether the injury is severe or slight, by each employe present.
If blank spaces are insufficient for full statements, answer further in form of letter and attach hereto.
Every question ***bearing on this accident*** must be ***answered fully.***

1. A. Name, residence (street and number) and P. O. address of person injured? Will Holloway, 617 Newton Ave.
   B. Age? 23. Occupation? Fireman. Nationality? American.
2. A. Married or single? Single. If married, name and residence of wife or husband?
   B. Names and ages of children?
   C. If single, names and addresses of father, mother and nearest relatives? Mrs. L. B. Holloway, Searcy, Ark.; Mr. and Mrs. T. H. Davis, Rosebud, White Co., Ark.
3. A. Employee, passenger, traveler on highway, or tresspasser? Employe. If employee, how long in service of this company, and in what capacities? 4 days; locomotive fireman. Date last entered in this company's service? Oct. 28.
   B. If passenger, where from and destination? Ticket or pass?
   C. If unknown, give full description (height, weight, hair, eyes, marks and clothing), and state what articles found on person?
   D. Circumstances in life? In good. How much accident or life insurance? None.
4. State fully the nature and extent of injuries, and prospect of recovery? Two ribs fractured on left side, left kidney badly bruised,
5. A. What was done with and for the person? Nothing. By whose direction? No one.
   B. Name and address of surgical attendant? Dr. E. Sharpe, 500 E. Adams St.
   C. If dead, state disposition of remains?
6. A. Give date and hour (day or night), and state exact point where accident occurred? Oct. 30, at 11.40 p. m., Trestle No. 547.
   B. If at night, was it very dark? Yes, very dark. Kind of weather? Foggy.
   C. Did the accident occur on or near a crossing? Yes. Public or private? Don't know. Name of crossing? Don't know. Distance and direction from same? Don't know.
   D. Was view of trainmen or injured party obstructed? If so, by what? State fully.
   E. On main or side track? On main. Curve or straight line (state whether curve to right or left)? Straight. Up or down grade? Level track.
7. A. Train No.? Light engine. Conductor, Yardmaster or Foreman?
   B. Engine No.? 3. Engineer? Davis. Fireman? W. Holloway.
   C. Baggageman? None. Head Brakeman? None. Rear Brakeman and Porter? None.
   D. Switchman? None.
   E. Give names of all other employees present? Engineer Davis.
   F. No. cars in train? None. No. loads? None. No. cars with air brakes? None. Speed of engine or cars at time of accident? 7 miles per hour.
   G. If train late, how much? No. In what direction train moving. East. If backing up, who was on rear end?
8. State your location with reference to point of accident? What were you doing? Putting in a fire.
9. Where was injured person, and what was he doing at time accident occurred? Was putting coal in fire box.
10. Give full particulars of cause of accident? Special engine No. 3 was backing up from Brinkley to Hulbert without headlight or pilot on back end of engine, ran into a horse on trestle No. 547 derailing tank and engine.
11. A. If person was injured in coupling cars, was he using coupling stick? Who examined coupling apparatus? Was it in good order?
   B. State kind of draw-bars? Were draw-heads of equal height?
12. Give initials and Nos. of engines and cars directly connected with this injury? Condition of same? If in bad order, were they so marked?
13. A. Was there any defect in track, bridges, buildings, rolling stock, machinery, tools, or other appliances that caused, or may have assisted in causing, the injury? And if so, state fully?
   B. If there was any defect, how long had same existed? Had same been reported? If so, when, by whom, and to whom?
   C. Did injured person know of defect?

[60] [Continue on other side.]

14. What precautions were taken by the person injured, or by any one, to prevent the accident? Engineer run very careful.

15. In your opinion, what further precaution could have been taken by the person injured, or by any one in any way? The company should have had a headlight on back end of engine, also a competent man to look out for danger.

16. Who was in charge of the engine? Engineer. Was it properly handled? Who was in charge of the train, or cars, at time of accident? Had no cars.

17. A. Was whistle sounded? No. Was bell rung? No. By whom? Was bell rung continuously? No.

B. Were any other signals or warnings given, and by whom, and in what way? No.

C. For what purpose were these signals or warnings given?

D. Did the person for whose benefit they were given act upon them? If not, why?

E. When and where, with reference to accident, was whistle sounded and bell rung? What distance did engine, or cars, run after accident? 3 car lengths.

18. What does injured person say as to extent of his injuries? Cannot tell just yet.

19. A. What does injured person say was cause of accident? Horse being in trestle.

B. Who, if any one, does he blame? Company. In whose hearing was injured person's statement made?

20. Was injured person insane, intoxicated, blind or deaf?

21. In your opinion, was any employee at fault? If so, who, and in what way? Chief Desp't.

22. In your opinion, was injured person at fault? If so, in what way? No.

23. Was any one at fault, and if so, who? Yes, the company, for backing engine without headlight.

24. Name, occupation, postoffice address, and residence of every person who witnessed the accident, or can give any information regarding it. Attach hereto the written statements of such persons, signed by each.

NAME.	OCCUPATION.	RESIDENCE AND POSTOFFICE. (Give Street Number).
Will Holloway	Fireman	617 Newton Ave., Argenta.
Will H. Davis	Engineer	300 Magnolia St., Argenta, Ark.

26. REMARKS: State fully any further information you can.

(Sign here) WILL HOLLOWAY,

Month, Oct., Day of month, 30. (Occupation) Fireman,

Dated Argenta, 1900. (Address) 617 Newton Ave., Argenta, Ark.

CHOCTAW, OKLAHOMA & GULF R. R. CO.

PERSONAL INJURY REPORT.

Name of party injured, DAVIS AND HOLLOWAY.

Residence, North Little Rock.

Occupation.....

Place of accident.....

Date of accident.....

NOTE: The within blanks *must in all cases be fully and accurately filled out* by Conductors, Trainmen, Agents, Foremen, or by parties in charge of party injured, *and as soon as possible* after the injury is inflicted, and forwarded by *first passenger train* to the Superintendent.

61 Q. Now, Mr. Holloway, did you make any other statement of this accident?

A. Why, the claim agent came over and I made something of a statement there, but I never saw it. He never read it to me after it was made.

Q. Where was it made? A. At Robin's drug store.

Q. When was it made? A. I don't remember.

Q. About what time?

A. I don't have any idea. I couldn't tell you whether it was November or December.

Q. Have no recollection?

A. No sir, none at all about it.

Q. Do you remember about what you said to him?

A. No sir, I do not. It was not read over to me after I made the statement at all.

Q. You remember what you said, don't you?

A. No sir, I do not. It was questions asked and answered.

Q. You don't remember what statement you made?

A. No sir.

Q. I will ask you to look over that and tell whether that is the statement or not?

A. I remember making part of it, and there is part of it I don't remember.

Q. Do you state you didn't make the balance of it?

A. I don't know. I wouldn't state. I don't remember. The questions were asked me and I was suffering.

Q. Is that a correct statement? Is there anything in that statement that is not so?

A. I don't remember. A thing of that kind a man can't carry in his head.

Q. Are these facts true whether you stated it to the claim agent or not? A. I can't say.

62 Q. You know what happened when you was injured?

A. Of course, I know what happened.

Q. I will ask you if there is anything in that statement that happened in connection with that accident, that is not true. If there is, just read it over and point it out.

(Statement is handed to witness who reads same.)

A. Yes sir, there is a part here I don't remember anything about. "I didn't see a copy of this order to run backwards." I did see it and read it. I don't remember that either about not seeing the back of the tank. I don't remember saying anything of that kind in it at all.

Q. With these exceptions, this statement is correct?

A. Yes sir, that is just about as well as I remember.

Q. (By the Court): Do you remember of having made that statement at all?

A. Something like that. Something on the order of that. I didn't sign any statement at all.

Q. (Counsel for Defendant): You say you don't remember about the date this statement was made?

A. No sir, I do not.

Q. Now, Mr. Holloway, who did you make this statement to, or who did you make the statement to over there in Argenta?

A. Made it to some lady or typewriter there is all I know.

Q. Who was she with?

A. Kilpatrick, I believe was his name.

Q. You made a statement to Mr. Kilpatrick and his lady typewriter? A. Yes sir.

Q. Now, if this is the statement that you made, why you made everything contained in here except those specified?

A. I don't remember anything about what the statement was. Of course, I couldn't keep a thing of that kind on my mind and the statement was not read to me.

Q. If you made these statements that you pointed out, they were not correct?

A. I don't remember anything about what the statement was.

63 Q. If you made them, or if they have got them down here, they are not correct statements of facts?

A. No sir, that is not facts in the case.

Q. Everything else that is set down here is correct?

A. I don't remember whether it is or not.

Q. You are testifying about this accident? A. Yes sir.

Q. These other things that are stated in here are correct, except those things that you have pointed out?

A. Well, I would have to read it very carefully and see. I have just merely looked over it. I don't remember anything about what the statement was.

Q. (By the Court): The question is not whether the statement was reduced to writing correctly, or whether you made the statement, but he is asking you now whether this statement was not true, what actually happened, and if not, to point out what parts of it is not true?

A. Well, your honor, I don't remember the statement at all.

Q. (Counsel for plaintiff): Just read that over line by line, and wherever there is a place that is not true, just call attention to it?

A. "We came into Brinkley about 7:30, I do not remember just the time we registered in there. We went over and had supper and came back. We had orders to take engine 3 W. & B. to Hulbert backwards. This engine was headed west and had a headlight on the front end. She had been used as a switch engine, and did not have a pilot on either end, and no headlight on the back end of the engine going east when

backing up. No conductor or brakeman in charge or messenger brakeman in charge. Our orders read to back up engine 3 from Brinkley to Hulbert. We registered at Brinkley at 11:17 and were running west to Hulbert" (that is a mistake, that ought to be east) "at the rate of seven miles an hour and on trestle 547 struck a horse in the center of the trestle. The tank left the track the second tie from the trestle at
64 the east end. The tank left the track on the south side of the track. I was putting in the fire at the time the accident occurred, and on finding that we were in a wreck, made an attempt to leave the engine." That is wrong there, "putting in a fire at the time the wreck occurred." I was putting in a fire when Mr. Davis made the halloo to look out. That is not like my statement at all.

Q. (Counsel for Plaintiff): Read that again. I don't understand your last remark?

A. It says the tank left the track the second tie from the trestle at the east end. I was putting in fire at the time the accident occurred, and on finding that we were in the wreck made an attempt to leave the engine. Well, I made an attempt to leave the engine, as my statement this morning, just as I was crawling between the cab, we struck the horse. I was trying to find the step on the right side of the cab to get my foot on it so as to balance myself and keep myself from falling. "I was putting in a fire at the time the accident occurred." That is a mistake—"made an attempt to leave the engine between the tank and the cab, and was caught between the tank and cab on the south side through the small of my back. The engineer had left his seat and turned to release the air, which caused the tank to drop down hill and release me. I left the engine on the engineer's side making a jump of 18 feet. We had plenty of time while we were in Brinkley between our arrival and departure to have turned the engine around, if we had been ordered to. I did not see a copy of this order to run backwards from Brinkley to Hulbert until after we had gotten to the water tank east of Brinkley." (That is a mistake; I did see it and read it.) "I saw this order by talking with the engineer about the danger of going back, and made the remark to him that I had just as soon go out and commit suicide as to make the trip backwards." (That is not the words I used. I said it was the first time I was ever ordered out to commit suicide. That was when we first had our jower in the yards at Brinkley, before we took the matter under consideration, that we could make the
65 run in perfect safety after consulting.) "It was a dark foggy night." (It was dark, and the fog was a light mist. There was no heavy dense fog at all, but a light mist of a fog.) "It was impossible to see the back end of the tank."

(I don't remember anything of that.) "We could not have taken the headlight off the front end and put it on the back end, because it was one of those stationary headlights. While our engine was standing on passing track near the station at Brinkley, I knew they were having some controversy in regard to turning the engine, and the engineer would between times ask what I thought about it, and he consulted me in regard to backing the engine up, and I knew by this conversation that he was endeavoring to have the engine turned and that he had been refused. When he came out to start, we had orders to run to Hulbert with engine 3 backward very carefully, and we were running very carefully, not going over six or seven miles an hour, and we stopped this engine less than three car lengths after hitting the horse." (That is a mistake.) After the wreck, and we were both hurt, we sent the message asking them to come as soon as possible. Dr. Edwin Sharp, No. 23 Newton Ave., Argenta, attended me."

Q. (Counsel for Defendant): Now, Mr. Holloway, what did you all go down to Brinkley for?

A. We went there on account of engine 33 being disabled in the pit and we took this 3 back there to use in the pit.

Q. I say to Brinkley. What did you double back to Brinkley from Hulbert for? You had been down to Hulbert; now, why did you come up to Brinkley on this engine, No. 3?

A. The traveling engineer said he was sending her in to the shops, that is where she was going for an overhauling.

Q. You said something this morning about something that you packed, didn't you,—I don't remember what it was—about packing something, or wrapping something?

A. That was the hose right under the tank.

Q. What was it you said you did to that?

A. Wrapped it. It was leaking and we wrapped it with some packing so we could get water in the boiler.

66 Q. Where is the tank situated? Where did you have to go to do that work?

A. Right under the gangway, right under the front trucks of the tank.

Q. You got under there and wrapped it?

A. Just sat down on the edge of the ties on the outside—rubber hose.

Q. What else was it you said you did?

A. That is all we did. Mr. Monroe, the traveling engineer, remarked to us that they had put a car box brass in the pony truck; that is all he had to put in it, and that we would have to watch it, and if it run hot, we would have to stop and oil and cool it, but it didn't run hot and we didn't fool with it.

Q. You said something about the bad condition of the door to the fire box, too, didn't you?

A. The top hinge was broken off.

Q. And you say the traveling engineer had sent you all down with the engine to take it in the shop for an overhauling?

A. No sir, Mr. Davis asked him, he said, "What is the matter with her?" He said, "She has got to go in the shops and be overhauled all over."

Q. The traveling engineer was down at Hulbert?

A. He was superintending the exchange of engines, oil, waste and cans and everything.

Q. Now, let us go back to the scene of the accident. What was it you said about being out on the steps there swinging out to get down?

A. No sir, I didn't say I was out at all. I had hold to the tank with this hand and to the edge of the cab with this one, just in that shape, and I was trying to reach the step with my right foot so as to balance myself and catch myself on the ground, and before I could catch the step with my foot, we run back there and run into the horse, and of course, went over, and we got in the mix-up, and I got caught with the tank and the cab.

67 Q. You were standing with one foot reaching down to the step at the time you got caught? A. Yes sir.

Q. Just explain to the jury how that engine was situated when the wreck took place, where the tender was and where the engine was, and just what it did when it went off the track?

A. Why, after striking this horse, run up on the trestle and hit the horse, and I was trying to get out of it, as to what it done, I couldn't tell you that.

Q. Well, after you got down, you stated this morning that you examined the engine; just state how the engine stood?

A. The rails on either side were turned over and the engine was on the bottom of the rail.

Q. Were the wheels of the tender on the bottom of the rail? A. No sir, they were off.

Q. How much off?

A. I suppose something like 20 or 30 inches.

Q. It had sort of gone around to one side?

A. Yes sir, it veered a little as it left the track.

Q. About how much had it veered?

A. About 30 inches, I suppose, somewhere between 20 and 30 inches.

Q. Which way did it veer? A. To the south.

Q. Which side did you go out on?

A. I went out on the engineer's side.

Q. On which side of the engine does the engineer sit?

A. The right hand side.

Q. Now, Mr. Holloway, where did you go after the wreck that night?

A. I got out and laid down between two ties, with my head against the rail.

Q. Didn't you walk up the track about 100 yards or so?

A. Flagged these boys coming in on top of me.

68 Q. How far up the track did you go?

A. Anywhere from 75 to 100 yards.

Q. You walked up there? A. I did.

Q. Didn't you get on that engine while it was in motion?

A. No sir, I did not.

Q. You are positive of that?

A. I am positive that the engine stopped and I got on when they stopped and stood right there.

Q. How long did you stay there that night before you left?

A. I staid there until the next morning about 6:30 or 6:40.

Q. Staid right there at that spot?

A. Right there at the wreck? A. Yes sir.

Q. Where did you go from there?

A. I went down to Palestine.

Q. Wasn't there a passenger train down there coming this way? A. Two of them.

Q. This wreck laid them out? A. Yes sir.

Q. Did you come into Little Rock on one of them?

A. No sir, did not; didn't have any pass, and they wouldn't let us come without a pass.

Q. Did you ask to come in?

A. I did, sent a message and asked to come in on the first train.

Q. When you got here, where did you go?

A. Went in the depot, and laid down on a seat.

Q. When you got into Little Rock? A. Right to our room.

Q. How far is it from the depot to your room?

A. About six blocks.

Q. Did you walk or ride? A. I walked.

Q. Now, Mr. Holloway, you allege here, as your sec-

69 ond ground of negligence that the railroad company had not provided for and did not have a headlight on the back of the engine? A. Yes sir.

Q. There was no headlight on the back of that engine when you started off that night? A. No, sir.

Q. Then, as your third ground, you allege that in not placing a man on the foot board, in front of the engine, with a white and red light. There was nobody on the front end of the engine, that is on the tank, when you left Brinkley?

A. No, sir.

Q. Fourth, in not providing for and furnishing said engine with a pilot or cowcatcher. There was no pilot or cowcatcher on the tank end of the engine that night?

A. No, sir.

Q. You allege as the fifth ground, that it was negligent, because it was a square or box engine; that is, the tank or tender did not slope backward or downward, so as to give a better view in front of the engine? A. Yes, sir.

Q. That was one ground of negligence, you allege?

A. Yes, sir, I suppose so, if it is in there.

Q. That is the kind of an engine it was—a square box engine? A. Yes, sir.

Q. It obstructed the view, did it?

A. Yes, sir, to a certain extent.

Q. Mr. Holloway, you know Mr. Whitmore, don't you?

A. I don't know whether I would know him or not. I saw him once or twice.

Q. You know the engineer that was on that freight engine that came up that night that you flagged down, didn't you?

A. Yes, sir, I believe that was Whitmore. I didn't know any of the boys over there. I was never with them any. I have always been with an Iron Mountain crew, and I didn't know many of these boys.

70 Q. I will ask you if you didn't tell him that night that what hurt you received, that you got it entirely from jumping from the engine?

A. No, sir, I didn't say anything of that kind. I didn't have any conversation with Mr. Whitmore that night at all.

Q. Didn't you get up in his engine and ride down a piece with him?

A. We rode, I suppose, probably fifty yards to the wreck, and we were talking about it and he was asking me how it happened.

Q. You are sure you didn't tell him that you got your injury in jumping from that engine?

A. No, sir, I didn't make any statement of that kind at all.

Redirect Examination.

Q. I neglected to ask you one thing before noon. I will ask you if this is the book of rules that the Company furnished you, and if you had that book at the time you were injured?

A. Yes, sir.

Counsel for Plaintiff here read the following rules from said book to the jury:

"2. In addition to these rules, the time-table will contain special instructions, as the same may be found necessary. Spe-

cial instructions, whether in conflict with these rules or not, which may be given by proper authority, whether upon the time-table or otherwise, shall be fully observed while in force."

"3. The head of each department must be conversant with the rules, supply copies of them to his subordinates, see that they are understood, enforce obedience to them, and report to the proper official all violations, and the action taken thereon."

"4. Every employe of this company whose duties are in any way prescribed by these rules must always have a copy of them at hand when on duty, and must be conversant with every rule. No employe, as above, will be permitted to engage in the company's service without first passing the prescribed examination on these rules. He must render all the assistance in his power in carrying them out, and immediately report any infringement of them to his immediate superior."

"5. The fact that any person enters, or remains in, the service of the company will be considered as an assurance of willingness to obey its rules. No one will be excused for the violation of any of them, even though not included in those applicable to his department."

"6. If in doubt as to the meaning of any rule or special instructions, application must be made at once, to the proper authority, for an explanation. Ignorance is no excuse for neglect of duty."

71 "9. Every employe of one division, when within the limits of another division, will be under the authority, and must conform to the orders of the superintendent of that division."

"34. Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two red lights in the rear. Freight trains will display an additional red light in the cupola. Yard engine must display two green lights instead of red, except when provided with a headlight on both front and rear."

"73. When a train is being pushed by an engine a white light must be displayed on the front of the leading car at night, or when the train is obscured by fog or other cause."

"79. All trains are designated as regular and irregular. Regular trains are those represented on the time-table and may consist of one or more sections. All sections of a train, except the last, must display signals, as provided in Rule 36. Irregular trains are those not represented on the time-table. An engine without cars, in service on the road, shall be considered a train."

"109. All messages or orders respecting the movement of trains or the condition of track or bridges must be in writing."

"111. Irregular trains must not be run without an order from the superintendent."

"152. Enginemen must use great care to avoid striking stock. If necessary, they must bring the train to a stop. Should any stock be killed or injured, the engineman must report same on the prescribed form."

"154. Whenever it becomes necessary to back a train it must be done with great care under cover of danger signals, and with a man constantly on rear car."

"500. Special orders, directing movements varying from or additional to the time-table, will be issued by the authority and over the signature of the superintendent, and only one person at a time shall issue such orders on any dispatcher's district. They are not to be used for movements that can be provided for by rule or time-table. They must not contain information or instructions not essentially a part of them.

They must be brief and clear, and the prescribed forms must be used when practicable; and there must be no erasures, alterations or interlineations.

Transfers of orders from one dispatcher to another shall be in writing in the train order book, dated, timed and signed, with complete list of unexpired orders; or if done by telegraph the above shall be transmitted, an understanding returned and complete [—] given before the authority is exercised by another person."

"501. Each order must be given in the same words to all persons or trains directly affected by it, so that each shall have a duplicate of what is given to the others. Preferably an order should include but one specified movement."

72 "503. Orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to a person acting as pilot. A copy for each person addressed must be supplied by the operator."

"504. Each order must be written in full in a book provided for the purpose at the superintendent's office; and with it must be recorded the names of trainmen and others who have signed for the order; the time and signals, showing when and from what office the order and responses were transmitted; and the train dispatcher's initials. These records must be made at once on the original copy, and not afterward, from memory or memoranda."

Q. You stated awhile ago, in response to Mr. Pierce's question here, that the way this tank was built, that it to some extent obstructed the view? A. Yes, sir.

Q. How far could an engineer, standing in the cab where you were, and where it was your duty to stand, how far in advance it would be before the range of vision would reach the ground in front of it?

A. Why it would be between 60 and 70 feet to look over.

Q. That was where the vision would strike the ground?

A. Yes, sir.

Q. If the horse was on the ground, you could still get nearer the horse; you could see the horse even closer than that?

A. Yes, sir, see the bulk.

Q. Of course, the higher the object was, the nearer the engine— A. The nearer you could see it.

Q. How far in your opinion that night could you have seen this horse ahead of you?

A. Why, I suppose a man would have seen the horse anywhere from 50 to 65 feet ahead of him.

Q. Now, you stated this morning something about these brakes. Brother Peirce asked you about your amendments. I will ask you when you gave me the information upon which this amended complaint was based?

A. After you had made the other, you came up and I called your attention to the fact that you had left it out, and you said well, you would just make the amendment to that effect.

73 Q. How long was that after I had prepared that complaint and sent it to Lonoke?

A. I don't remember how long that was.

Q. This suit was originally brought in Lonoke, wasn't it?

A. Yes sir.

Q. You went up to Searcy some few weeks, as soon as you got able—your people, some of them, live at Searcy?

A. Yes sir, my home is there.

Q. I will ask you whether or not you left that information with me before you went up there?

A. I don't remember right now whether it was before or after I went back.

Q. About how long was it, after I drew the first complaint, before you told me about the brakes being defective, according to your best judgment?

A. Why, it was some time after that.

Q. I will ask you this: Do you remember of me taking a memorandum from you of additional data that I wanted to include in that complaint?

A. Yes sir, I brought you back a memorandum.

Q. Do you remember whether that was before or after you went to Searcy?

A. Well, I don't remember whether that was before or after.

Q. You stated this morning, that you didn't know what it was contended by the company, or, at least, didn't know that there was any brakes at all there, or at least, that is my impression, until you read the answer here, or I read a copy of the answer? A. Yes, sir.

Q. Now, at the time you made this complaint, you stated here that the brakes were defective and they wouldn't work. Now, I will ask you to what extent your attention was called to brakes that night that gave you that information?

A. No more than just merely passing by.

Q. Did you notice the shoes?

74 A. Why, I don't remember whether there were shoes. It seems to me there were shoes on the brakes, but it might be possible I may be mistaken about that.

Q. Did these shoes when the air was turned on clasp the wheel? A. Yes sir.

Q. I mean that night?

A. No sir, there wasn't nothing clasped these wheels at all.

Q. If the engine had been properly equipped with brakes and the air in condition with the air turned on, would the effect of that be to clasp these shoes on the wheels?

A. Yes sir.

Q. Now, you say the night of the injury, when the air was turned on, these shoes, if they were on there at all, didn't clasp the brakes? A. No sir, they didn't clasp them.

Q. You stated this morning also that you had no occasion, it was not a part of your duty as a fireman to look after the brakes?

A. No sir. It is in no ways connected with my affairs at all.

Q. In fixing this pipe that is near the tank, did that bring you in touch with the brakes under the engine?

A. No, sir, I was behind the fire box at the end of the engine, sat with my back to the engine, my face to the back of the tank, working on the hose in front of me.

Q. Unless your attention had been called especially to the brakes, you wouldn't have seen them?

A. No, sir, I never pay any atention to anything of the kind, unless an engineer will ask me to do something for him.

Q. Did you suppose at the time you left Brinkley the brakes were in proper working order? A. Yes sir.

Q. Did you ever work on an engine before in your life that was not properly equipped with brakes?

A. No sir. I have had, once in my life, to cut out the tank brakes because it wouldn't work. That is done by a valve under the cylinder.

75 Q. Now, if there had been brakes on this engine, when the air was turned on, what effect would that have had upon the engine?

A. It would have held the tank and the engine the same distance apart, and kept them perfectly steady.

Q. Can an engine and tank be stopped, where the brakes are in proper order, properly equipped, when you have the brakes on the engine and tank both, than it can with just brakes to the tank? A. A great deal quicker.

Q. Which is the heavier, the engine or the tank?

A. The engine is several times heavier than the tank.

Q. Then I understand you to state the effect of turning on the brakes, would be to hold the tank and the engine the same distance apart? A. Yes sir.

Q. And they could be stopped quicker with proper appliances than they could if you had had no brakes upon them?

A. Yes sir, the weight of the engine alone, with the air applied to the wheels, would stop it almost instantly.

Q. Did you see the horse after it was run over?

A. Yes sir.

Q. Did the engine pass entirely over the horse?

A. Yes sir, engine passed over the horse about ten feet. The horse was laying up in front of the engine; everything passed clear over it.

Q. You stated while ago in cross-examination, that the engine was derailed, and that the rails were turned upside down?

A. Yes sir, they were turned very near over.

Q. Explain about these shoes, how they are made, so that these gentlemen can understand how the shoes are made to operate on the wheel?

A. The shoes are very large and very heavy; they are something like that long, and I suppose, about five inches wide, and say 2 1-2 or 3 feet long, and they are in the shape of the wheel, and there is a plunger that works from the air valve down and throws each brake to its wheel.

76 Q. These shoes are made in a semi-circular shape and when the air is applied, these shoes are clasped right around the wheel? A. Yes sir, perfectly tight.

Q. How many wheels did this engine have on each side?

A. Three drivers on each side.

Q. You mean the large wheels?

A. Yes sir, three large wheels.

Q. These small wheels, what part of the engine are these?

A. The pony truck.

Q. Did you have any occasion to do any work on this engine at that point where the apparatus of the brakes was constructed or made, after you got onto that engine? A. No sir.

Q. Did you have anything to do about the engine that your attention would have been called to the brakes, whether they were in condition or out of condition?

A. No sir. I was only off my engine once from Hulbert to Brinkley, only got off one time to wrap the point.

Q. That was at a point where you could not see the brakes?

A. No sir, I couldn't see them at all. I was just on the corner of the tank, just sat on the corner of the tie and wrapped that hose.

Cross-Examination.

Q. Mr. Holloway, I will ask you if these amendments you were asked about by Mr. House were given to him before the first of this term of court?

A. I couldn't tell you, to save my life; I don't remember when it was; have no recollection about it, I just remember giving him the memorandum.

Q. Did you give him all the memorandum at the same time? A. No sir, I didn't give it—

Q. Was it while the case was pending at Lonoke?

A. I couldn't tell you to save my life. I don't remember much about it.

Q. Now, Mr. Holloway, you say that the brakes
77 didn't clasp this night. How do you know they didn't?

A. There was nothing clasped to the wheel.

Q. How do you know they didn't?

A. I passed by the engine with my torch.

Q. Afterwards?

A. Yes sir, and I didn't see the brakes clasped to the wheel.

Q. If there had been any on there, they would have been released then?

A. No sir, the air stood right into the emergency, until after everything was out and over with.

Q. You don't remember whether there was any shoes on it at all or not?

A. No sir, I do not. I am as liable to be mistaken as anybody else, but I think I am right about it.

Q. Didn't you say while ago that the way you got out from the place you were fastened there was by the engineer releasing the brakes? A. Yes sir, I did.

Q. So that if the brakes had been clasped that night, when the engineer released the air, it would have released the brakes?

A. Yes sir, but as I said, didn't he throw it in the emergency immediately on my falling, and we both left the engine?

Q. Did you go to the company's hospital at any time?
A. No sir.
Q. They have got a hospital?
A. I didn't know at that time that they had any at all.
Q. Didn't the company physician come to see you?
A. On the 11th day after I was hurt, he came there and said some one had neglected to report me being sick to him, or being hurt.
Q. You didn't have him to examine you, or didn't ask him to wait on you?
A. That was just with him. I told him he was at liberty to do so.
Q. You did?
A. Yes sir, and he made the remark that I had as fine a physician and surgeon as there was in the town, and I would abide his decision.

78 Will Barger, a witness for Plaintiff, testified as follows:

Q. What is your profession or business?
A. Brakeman.
Q. Are you in the employ of the Choctaw Company?
A. I am.
Q. Were you in the employment of that railway on about the 30th of October last?
A. I have been here ever since the 10th day of April a year ago.
Q. Were you fireman in the service of the Choctaw, Oklahoma & Gulf Railroad last November a year ago?
A. No sir, I was brakeman. I have been braking ever since I have been in the employ of the company—at Hulbert, about that time, on a work train.
Q. Are you acquainted with engine No. 3 W. & B.?
A. Yes sir.
Q. Did you ever have occasion to work with it?
A. Yes sir.
Q. Do you remember the occasion when Mr. Holloway claimed to have been injured by this engine coming in collision with a horse?
A. I don't know what date it was, but I remember the time of the trouble. I heard about it, heard the boys speak of it.
Q. Had you any knowledge of this engine before that injury occurred? A. Yes sir.
Q. What was the condition of the brakes of this engine?
A. She had air on her tank, but none on her drivers.
Q. How long before Mr. Holloway got hurt did you know it was in that condition?
A. I don't know just exactly how long; it was quite a little bit though.

Q. Several weeks you think? A. Yes sir.

Q. Did you work on that engine down there at Hulbert?

A. Yes sir, we had her in the pit.

79 Q. Were you fireman or were you brakeman?

A. I was brakeman.

Q. You say at that time that this engine No. 3 W. & B. had no air on its brakes? A. Had air on the tank.

Q. Had none on the engine. Do you know whether the apparatus or brakes were there, or whether there was any brakes there at all or not?

A. As far as I can remember, I don't think there was. There might have been without my seeing them. I don't think that there was any.

Q. You know there was no air that could be applied to the engine?

A. Not to the engine. There was on the tank.

Cross-Examination.

Q. Don't you know that there wasn't any brakes on the driving wheels of the engine?

A. I couldn't say positively, but I don't think there was.

Q. Aren't you pretty positive that there wasn't any brakes on there? A. I never did see any.

Q. If there had have been, you could have seen them?

A. Yes sir.

Q. (By the Court): Can't you tell positively? Did that engine at that time have brakes on it?

A. Her air was not connected with the engine. It only had air brakes on the tank.

Q. But that is not the question. Did they have brakes, brake shoes, on the engine? A. No sir, there was not.

Q. (Counsel for Defendant): There were no brakes on the engine? A. No sir.

80 Q. Was any of the rigging or gearing on the engine that the brakes were fastened to? A. No, sir.

Q. What position do you say you occupied then?

A. Brakeman.

Q. Are you still in the employ of the company?

A. Yes sir.

Q. I will ask you if it is possible for a man to ride on the engine from Hulbert to Brinkley over that track, with brakes on the tender and no brakes on the engine, and be ignorant of the fact that there are no brakes on the engine?

A. No sir.

Q. Just explain to the jury why?

A. Well, if an engine has brakes on her tank and none on her drivers, in making each stop, the tank would hold to the

engine, would bump up against her, because it has nothing there to hold the wheels of the engine.

Q. If a man is on an engine, and there are no brakes on the engine, but brakes on the tank, he can tell by the movement of the engine whether there are any brakes on the engine, couldn't he? A. In stopping, yes sir.

Q. I will ask you if a good deal of that track is not very rough, so that a man would be more likely to ascertain that fact than not? A. It was when I was there.

Redirect Examination.

Q. Now, Mr. Barger, what did you mean awhile ago, when you stated, in response to my question, that you wasn't certain whether there were brakes on there?

A. There were no brake shoes, because the air was not connected. There wasn't any air on it at all.

Q. Were the shoes there themselves, but no air?

A. No sir.

81 Q. Well, what did you mean when you stated awhile ago that you wasn't certain whether there was any shoes, or whether the brakes themselves were there or not, but the air wasn't turned on?

A. Well, you asked me if it had any air on the drivers, and I am sure they had no apparatus there to work it with.

Q. You stated while ago that you wasn't certain about that? A. Yes, sir, I did.

Court: He said, "I don't think it had any brakes on, but I don't know positively."

Q. You stated in running an engine from Brinkley here that you could tell because one would bump up against the other. You mean when the tank is being run in front of the engine? A. In backing up?

Q. Yes, sir?

A. Why in applying the air, your shoes would work on your tank and the engine would shove it.

Q. That is when the engine is running the rear of the tank, the tank running in front?

A. Yes, sir, that is about the way it would work.

Q. Now, let us turn the engine on front of the tank. There would be no bump then if the engine was running in front of the tank?

A. It would drag it.

Q. Suppose you would go along very slowly, no occasion for going rapidly?

A. If he wasn't going very fast, why it wouldn't make much difference.

Cross-Examination.

Q. You stated on reflection that you are certain that engine didn't have any brakes on the drivers, and none of the apparatus for brakes, didn't you? A. Yes, sir.

Q. The brakes were only on the tank?

A. Only on the tank, that is all.

Q. I will ask you the question again, Mr. House kind of confused you, I will ask you if the bumping sensation is produced that you speak of when the engine is running ahead of the tender, or when the tender is run ahead of the engine?

82 A. Why, in backing up, when you put your air on, that holds your tank, well the engine is bound to bump up against it.

Q. Suppose the engine is running along in front of the tank, and you apply your air to the tank, what effect is produced then?

A. It just drags it. It depends on how fast you are going.

Q. Wouldn't that produce bumping too—the engine jumping along in front of the tank?

A. Yes, sir, I think it would.

Redirect Examination.

Q. That would depend upon the speed you are running?

A. Yes, sir.

Q. (By the Court): What speed would you call speed? How many miles an hour would it be?

A. Well, going ten miles an hour, it would have some effect, but a person running slow.

Q. What do you call slow?

A. Four or five miles an hour.

Q. (By the Court): How in running 7 or 8 miles an hour?

A. It would be about the same, I guess.

Q. (By the Court): It would be noticeable? It would be felt? A. Yes, sir, I think it would.

Q. (By the Court): If it runs seven, and if it runs three or four or five?

A. Running about four miles an hour, you couldn't tell it much.

Q. (Counsel for Plaintiff): The engine is much heavier than the tank? A. Yes, sir.

Q. An engine running along at the rate of 6 or 7 or 8 or 10, or 15 miles an hour, makes a good deal of noise?

A. Yes, sir.

Q. You put on the brakes which clasp the wheels of the tank, but don't clasp the wheels of the engine in front, now then wouldn't the tank keep the same space from the

83 engine, with the engine in front, that it was when the brakes were applied? A. I don't think it would.

Q. Why not?
A. Why it would be dragging on the engine.
Q. What would be dragging on the engine?
A. The tank.
Q. The tank is connected with the engine by means of a goose neck, isn't it?
A. Yes, sir, with a link and chain.
Q. How could the tank be dragging on the engine when it is only connected with a goose neck?
A. It would be the slack in it.
Q. But suppose the engine is going in front, there would be no slack as long as the engine was going, would there?
A. There would be in stopping, yes, sir.
Q. Wouldn't that depend entirely upon the grade? Suppose you were going an up grade, wouldn't the tendency then be for the tank to hold backwards, as soon as the brakes were released? A. Yes, sir, and hold it.

84 Mr. Jos. W. House, Attorney for Plaintiff, testified as follows:

I wish to state that Mr. Holloway called me, through a relative of his or himself one, I don't remember which, to come over to see him a few days after this injury is alleged to have occurred. I took a statement from Mr. Holloway that day. He was suffering very greatly, but I took the statement from him, and I was anxious to file the case in the Lonoke County Court, so as to be certain to get service in time to try the case in Lonoke County, and if he made any statement to me about the brakes being out of order, I don't remember it, but when I prepared the complaint and he was sworn to it—I don't think I was present—but afterwards I had a copy, and within less than a week's time, he called my attention to the fact that the brakes were defective and explained about the brakes not clasping the wheels, and then soon after that, in speaking with Mr. Peirce about it, he told me he was going to remove it to this court, and I never filed that amendment, but I had a pencil memorandum of the amendments to be filed, which he gave me soon after the original complaint was filed, but as I found the case was going to be removed, I didn't file that amendment until the case was removed here, as a matter of convenience, and as a matter of saving a little expense, and on the second page, or the third page, where the complaint reads as follows: "and thereby stop the engine; in fact, there were no shoes on the brake of the engine," that was put in there at my own instance and is interlined. I did that at my own instance from the fact that according to his statement, there were no shoes, and I was unable to determine whether there were shoes there. He said if there were any, they were

not clasped, and I alleged, to be on the safe side, that there were no shoes there at all, and I will state, from no statement from Mr. Holloway did I ever know there were no brakes at all on the engine, until I read the answer here. Now, that is the only explanation I wish to make.

Q. These amendments were made after the demurrer was filed, were they?

85 A. Yes sir, these amendments were made after the demurrer was filed, but I told Mr. Peirce at the time he filed the demurrer, or as soon as my attention was called to it, that I intended to file an amended complaint, and that perhaps when I did that, it would obviate the necessity of arguing the demurrer, and the filing of the demurrer had nothing on earth to do with the filing of the amended complaint, because I had that data and that memorandum in my office and intended to do it before I ever came to trial, whether he demurred or not.

86 Will Holloway, plaintiff, being recalled, testified as follows:

Q. Were you in here just while ago when Mr. Barger was testifying? A. No sir, I was out at the time.

Q. Now, I will ask you, in running the engine without brakes, and running it in front of the engine, in coming back from Hulbert, if there was any occasion for stopping the engine in any way for you to notice, or could you have noticed, or did you notice, that there were no brakes on the engine, or that they were out of repair?

A. No, sir, we had no occasion to use any brakes in case of emergency, or anything of the kind. In coming into a station, or making a stop for a water tank, we shut off and rolled in, come in slow.

Q. Shut off what?

A. Shut off the steam and let the engine roll, just by the mere touch of the brake, until you get here to where the spout will come down in the tank. It was a very easy matter to stop her on any ground.

Q. Then there was no occasion in coming from that direction, where you had to stop, to put on the brakes with any force, so as to create any jarring?

A. Yes sir, there was no occasion for that at all; had nothing but just a light engine.

Q. Now, suppose you turned the brakes on that engine, as it was, and the tank is behind you, wouldn't the space between the tank and the engine remain just the same?

A. If there was brakes on the engine?

[A.] No, if there were no brakes on the engine. Suppose you put the brakes on the tank and the engine is going forward?

A. Why, yes sir. Of course, the weight of the engine would drag the tank; the weight of the engine is so much greater than that of the tank, it would drag it along running at anything like its speed.

87 Q. Was there any time that there was occasion to put on the brakes so as to call your attention to the fact that it was dragging and the brakes were not applied to the engine?

A. No sir. We had nothing but a light engine; we could shut off anywhere we wanted to, and stop anywhere we wanted to.

Cross-Examination.

Q. You seemed to make proper stops coming over?

A. Yes sir, we would shut off, if coming into a tank; of course, we could see a tank, and any man that is handling an engine any length of time can always make a calculation to shut off his steam and know just how far it will roll.

Q. In coming over, the use of the engine was such that you could handle it and make proper stops whenever you wanted to?

A. Yes sir, we had no occasion to stop for any emergency stop, or for anything of that kind; just allowed ourselves plenty of time.

Q. How long were you going over?

A. We registered out of Hulbert—I think I have got the orders now—I believe it is 1:01, and we registered into Brinkley something about 7:20.

Redirect Examination.

Q. That was about six hours? A. Yes sir.

Q. How far was it?

A. About sixty miles; about ten miles an hour.

Plaintiff read from the Carlisle Life Tables, showing that the expectancy of a man 33 years of age was 32.36 years.

Here the plaintiff rested.

88 Defendant's Testimony.

Thereupon, the defendant, to sustain its defense, introduced the following testimony:

Dr. J. P. Runyan, a witness for defendant, testified as follows:

Q. What position did you occupy in October last?

A. Division Surgeon of the Choctaw.

Q. Do you know Mr. Will Holloway?

A. Yes sir; that is, I don't know whether I would know him if I would see him now or not. Yes sir, I recognize him.

Q. Did you see him any time about the 30th of October, or a few days after that?

A. Yes sir, I think it was in November some time I saw him.

Q. Whereabouts, and under what circumstances?

A. Well, the claim agent telephoned me to come down and see him. Mr. Kilpatrick telephoned me to go over into Argenta at his home and see him.

Q. Did you go? A. I did.

Q. Just tell the jury what took place between you over there?

A. Well, I went in, and I didn't know anything about the particulars of the case, of course, until I got there. I was just asked to go see the man, very often get these messages, and I responded to the call as quickly as I could, and went over and found Mr. Holloway in his room, lying in bed, and asked him if there was anything I could do for him, and he asked me who I was, and I told him, introduced myself, and he said no, there was nothing I could do for him; that he had a physician, and just remarked that it was a pretty good long while after being hurt for the company to send a man to see him. I asked him if he had sent for me, and he said no, he hadn't sent for me; that the company was supposed to send a man to him. I told him that the company had me employed for that business, but a man when he got hurt, was supposed to let me know.

89 I didn't know when he was hurt.

Q. Did you offer to treat him then?

A. Well, yes sir. I asked him if there was anything I could do for him, and found he had a physician, and of course, I told him if he needed me, he would have to have his physician call me in; that I wouldn't take charge of his case without the other man calling me in to assist him in consultation.

Q. Did he tell you then that it was with you whether you would treat him or not?

A. Of course, I left it with him. The other physician was treating him, and I told him if he needed me, he would have to have his physician call me in; that if he wanted me at any time, he could have me, of course, by having the other physician call me.

Q. I will ask you what provision the Company has made here in Little Rock to take care of its injured employes in the way of physician and hospitals?

A. They at that time had arrangements, and still the same arrangement, with St. Vincent's Infirmary, by which people are taken care of without any expense to themselves, that get hurt on the Choctaw Railroad—employes.

Q. They take them there and take care of them?

A. Yes sir.

Q. They have nurses to look after them?

A. Yes sir.
Q. And do it without any expense to them?
A. Yes sir.

Cross-Examination.

Q. Isn't it a fact that in order to compensate for that service over there, that the wages are taken out of employes of the road at the end of each pay day, a certain amount?
A. That is my understanding.
Q. You don't remember how long it was after the injury occurred, before you were called over there?
90 A. As well as I remember, it was eight days.

Redirect-Examination.

Q. The compensation monthly is taken out, regardless of whether they are injured or not?
A. Yes sir.
Q. If they are not hurt, they have to pay just the same?
A. Yes sir.

Cross-Examination.

Q. You don't know, as a matter of fact, whether the plaintiff here had any knowledge of that arrangement over there at that time until you went there?
A. No more than that it is the general understanding that everybody who works for the Choctaw has a certain stipulated sum taken out of his salary, according to what the salary is, and he knows that that goes on the hospital fund, and that the surgeon and hospital are free to him when he is sick.
Q. There are certain rules and instructions promulgated?
A. They all receive these instructions, yes sir.

91 E. M. Roberts, a witness for defendant, testified as follows:

Q. What position did you occupy on the 30th of last October?
A. Foreman Locomotive & Car Department at Brinkley.
Q. Do you know the plaintiff, Will Holloway?
A. I am not personally acquainted with him, no sir.
Q. You have seen him?
A. Yes sir, I have seen him.
Q. Did you see him on the 30th of last October?
A. Yes sir.
Q. Whereabouts? A. At Brinkley.
Q. Did he come to Brinkley on engine White & Black No. 3? A. Yes sir, him and Mr. Davis.
Q. Are you acquainted with White & Black engine No. 3?
A. Yes sir.

Q. Tell the jury how that engine is equipped with brakes, how many brakes she has got on her, and where the brakes are.

A. She has only tank brakes on her; that is, on both pair of trucks, what we call two pair of trucks under her tank; there is air brakes on both of them pairs of trucks, but there is no brakes at all on her drivers of any kind; never have been since I have had charge of the engine two years last February.

Q. There was none on it then on the 30th of October last?

A. No sir.

Q. Explain to the jury, if there had been any brakes on the drivers of that engine, where the brakes would have been, and about the size of them, &c.?

A. Well, the brake shoes are about 12 or 14 inches long, about six inches wide, and about an inch and a quarter or inch and a half thick, and the brake head is about eight inches wide sets right up in front of the driving wheels, and then there is a brake cylinder that would sit right up under the running board of the cab, with a long lever running out here, and the lever runs down to the brake, so that when you apply the air, it shoves this lever out and applies the
92 brake to the driving wheel. It is very bulky, a man couldn't help but see it if he was to look at it, but this engine had none on.

Q. You say it is perfectly obvious, by looking at an engine, whether the brakes are there or not?

A. I would miss a driver brake on an engine as quick as I would a wheel.

Q. It stands out so it can be plainly and clearly seen?

A. Yes sir.

Q. Could a fireman who had had several years' experience, traveling on an engine from Hulbert to Brinkley, and from Brinkley back, 13 or 14 miles, without knowing whether there was any brakes on the driving wheels or not?

A. I don't see how he could. He must have been a very careless fireman to do anything of that kind, not pay any more attention to his engine than that. He could tell by the feel of the engine, the speed of it, whether there was brakes on it or not.

Q. How many driving wheels did this engine have on it?

A. Six, three on each side.

Q. Then, if there had have been brakes on the driving wheels, there would have been four brakes?

A. Yes sir, there would have been brakes on two of the driving wheels. There would only have been brakes between the two back wheels on that engine the same as an eight wheel engine.

Q. Do you understand engines pretty thoroughly? Are you an engine builder or repairer?

A. I have had about seventeen years experience with the Iron Mountain Railroad as locomotive machinist and foreman before I came to the Cotton Belt Road. I worked with them four years at Jonesboro, and I took charge of the White & Black River shops for W. J. Thompson the 10th day of last February two years ago, and have been there ever since.

Q. When you took charge of that engine, did she have any brakes at all on her? A. No sir.

93 Q. Who put these brakes on the tender?

A. I did.

Q. When was that done? Was it before or after the Choctaw leased the White & Black.

A. The summer before the Choctaw leased the road.

Q. Are you sure about that? Wasn't it after?

A. No sir, it was before. I sent and got an air pump, new, and everything complete and put it on at Brinkley myself.

Q. Now, Mr. Roberts, I will ask you, if that engine was travelling say six or seven miles an hour, under perfect control, and an animal should be discovered on the track, say 50 or 75 feet in front of the engine, whether it could be stopped or not?

A. Yes sir, the air should be plenty strong to stop it in less than that many feet. It ought to stop it in 35 feet or 30 feet—40 at the outside.

Q. Did you have any conversation with Holloway that night at Brinkley, while he was in there?

A. I didn't have any particular conversation with him. He was present when I was talking to Mr. Davis, the engineer.

Q. What conversation did you all have there?

A. Mr. Davis told me if he didn't get out right away, that him and Mr. Holloway were going to go to bed; that they had been out a good many hours—he told me the number of hours, but I forget just what number there was—and that they were tired and sleepy, and that they didn't feel like going back, and especially they considered it unsafe or dangerous to back up through the bottoms at night, the track was full of stock lying down on the track, and I asked Mr. Davis where him and Mr. Holloway would be in case they did go to bed, and they told me they would be at the Arlington Hotel, and I instructed my caller, Mr. Cupp, where to find them and to call them the next morning at four o'clock, give them the eight hours rest, and I went home, supposing they would go to bed.

Q. Where a man has been out as long as they had, did they have a right to demand rest? A. Yes sir.

94 Q. And give it to them, do they?

A. Yes sir.

Cross-Examination.

Q. There was a necessity for the engine going back to Hulbert as soon as it could get down there practically, wasn't there?

A. They were ordered to go back there from Brinkley after they arrived there.

Q. At Hulbert, didn't they have a dirt pit there, from which they were hauling out dirt and putting it on the road?

A. Yes sir.

Q. Isn't it a fact that the engine that they had was reported as being disabled? A. Yes sir.

Q. That was the reason of sending this engine back?

A. Yes sir.

Q. You speak about stopping an engine in 40 feet—running at what speed?

A. Six or seven miles an hour.

Q. Is that when it is all equipped properly with brakes?

A. I can stop it some quicker than that if they had driver brakes.

Q. Going at the rate of 6 or 7 miles an hour?

A. Yes, sir.

Q. What position have you filled in the railroad department? A. I am a machinist.

Q. Have you ever been an engineer A. Yes sir.

Q. Have you ever traveled on the road? A. Yes sir.

Q. Have you ever acted as engineer on the road?

A. Yes sir.

Q. How long?

A. About four months on the Texas & Pacific Road. I got that arm mashed and quit it.

95 Q. Is that the only experience you have had as engineer?

A. No sir, I have run quite a good deal on the White & Black River Branch.

Q. You say if an engine is properly equipped with brakes, you could stop in less than forty feet?

A. Yes sir, a little bit.

Q. Running at the rate of seven miles an hour?

A. Yes sir.

Q. If there are no brakes on the engine, then do you say you could stop within forty feet? A. Yes sir.

Q. Stop within forty feet without brakes on the engine?

A. Yes sir.

Q. No brakes at all, except on the tank?

A. No brakes at all, except on the tank.

Q. Didn't you tell Mr. Davis that they were not going to turn that engine around at Brinkley?

A. No sir, I don't think I did. I don't recollect of ever having any such conversation as that with him.

Q. Were you in charge of the yards at the time?

A. I was in charge of the engine.

Q. Of the engine department at Brinkley?

A. Yes sir.

Q. Didn't you know that the engine was going backwards when it did go? A. Yes sir.

Q. Didn't you know that they were instructed to run it backwards? A. Yes, sir.

Q. Didn't you know that Davis had no right to turn that engine, unless they were instructed to do so from the proper source?

A. Yes sir, if they had no special orders to go back that way, and wanted the engine headed the same way she was going, they had a right to turn her. I would turn it myself.

Q. They did have orders to run it backwards, didn't they?

A. Yes sir, had orders to back up from Brinkley.

96 Q. Would you have had the right to have changed that order without some authority from headquarters?

A. No sir.

Q. Then if they were ordered to back up to Brinkley, you would have had no right to turn it there? A. No sir.

Redirect Examination

Q. I will ask you why it was they had to back that engine up?

A. In order for her to be headed right to work in the pit.

Q. Explain to the jury so they will understand it?

A. Well, the engine wanted to work the cars ahead of them, so the engineer could see right ahead of him when he was working loading or handling these gravel cars.

Q. That is, they wanted the engine headed the way she was then when it got back to Hulbert? A. Yes sir.

Q. Now, when it got back to Hulbert, if they had turned the engine it would have been facing east? A. Yes sir.

Q. Now, what means, if any, did they have at Hulbert for turning the engine?

A. They didn't have any, I don't think.

Q. Then in order to turn the engine and use it as they wanted it at Hulbert, what would they have had to have done?

A. They would have had to go to Hopefield.

Q. How far beyond was that?

A. I don't know exactly how far. I never paid any attention to the time card, how far it was.

Q. They would have to run on to Hopefield and turn the engine, and then run back to Hulbert in order to get there with the engine headed the proper way they wanted to use it to work? A. Yes sir.

97 C. H. Welch, a witness for defendant, testified as follows:

Q. What were you doing on the 30th of October last?
A. I was master mechanic of the Choctaw at Argenta.
Q. Do you know the plaintiff, Will Holloway?
A. Yes sir.
Q. Do you remember the time that he was on an engine going backwards from Brinkley east, and the engine was derailed about 15 miles east of Brinkley? A. Yes sir.
Q. Were you over there? A. Yes sir.
Q. Did you see Holloway at that time? A. Yes sir.
Q. How long was it after the wreck that you saw him?
A. Well, I am unable to state the exact time. It was the same morning though, when they had picked the engine up and pulled it into Palestine.
Q. How did you go over there?
A. I went over with the wrecking outfit.
Q. Did you see Holloway when you got over there?
A. Yes sir.
Q. What was he doing?
A. When I got to the engine, he was up in the cab. He got out of the cab and stepped down on the ground where I was.
Q. What evidence of injury did he have, or make any complaint of? What seemed to be the extent and nature of his injury.
A. Well, he said that he had strained his back when he got off was all he said to me.
Q. How long did you stay there?
A. I was there until No. 1 came along. I don't remember just the exact time. It must have been somewhere about twelve o'clock.
Q. Did you come back with Holloway?
A. In the same train with him, yes sir.

98 Q. Did you notice him making any complaint about any serious injuries? Did he seem to be specially hurt?
A. No sir.
Q. What complaints did he make, if any?
A. He didn't make any complaint, only just the remark he made when I first got there. I ask him if he had been injured, and he said that he hurt his back in getting off—strained his back getting off.

Q. Were you acquainted with that engine that Holloway was on? A. Yes sir.

Q. Was there any part of the brakes on that engine?

A. No sir.

Q. Was there any of the equipment that goes with it?

A. No sir, not on the engine.

Q. Now, Mr. Welch, if a man has had several years experience as a fireman and knows something about building tenders or tanks, I will ask you if it is possible for a man to ride on an engine from Hulbert to Brinkley and from Brinkley back 15 or 20 miles, over the track without knowing whether there were brakes on the engine? A. No sir.

Q. Explain to the jury why?

A. Well, the brake is something that is in plain sight of the engineer. It is not hidden in any way if it is there.

Q. Is it in sight of the fireman?

A. In sight of the fireman as well. If he looks at the engine at all, he can't help but see it.

Q. Is it as patent as the wheel of the engine?

A. Just as patent as the wheel is, yes sir.

Q. If he was riding on an engine, and there is no brake on the driving wheel of the engine, what evidence would there be then that there was no brakes on the driving wheels? How would a fireman know that there were no brakes on the driving wheels of the engine by riding along, from the

99 motion of the engine, if any?

A There is nothing about the riding of the engine would tend to show him that part of it.

Q. Suppose he stopped the train, and the air is applied to brakes on the tender, but there are none on the engine, would there be anything then?

A. There would be just a slight difference in the distance they would stop in.

Q. Would there be any bump or running along in front?

A. No sir, I don't think there would be any difference about that part of it.

Q. Then the only reason why he should see them is they are just in plain sight?

A. Yes sir, that is all.

Q. Now, Mr. Welch, suppose that engine, equipped as it was, with brakes on the tender, and under perfect control, running five or six or seven miles an hour, and an object was seen, could it be stopped in time to prevent running over the object?

A. Well, an engine that is not moving more than six or seven miles an hour, with a good tank brake, ought to stop in 45 to 50 feet, if they are not making more speed than that.

Cross-Examination.

Q. You say, without any brakes on the engine at all, it ought to stop in 45 or 50 feet?

A. Yes sir, good tender brakes.

Q. If the tender was running in front, and the brakes were suddenly turned on the tender, wouldn't the momentum of the engine without brakes be pushed up against that at once?

A. Not to do it any injury, no sir.

Q. The engine is a great deal heavier than the tank, isn't it? A. Well, yes sir, that engine was a little heavier.

Q. Now you say a man could see this brake if he had looked at it, suppose the fireman was riding in the engine all the time, he couldn't see it from where he was acting as fireman, could he?

100 A. You can see, yes sir; you can see part of the appliances from the cab of the engine.

Q. You can by looking for it? A. Yes sir.

Q. When you say it is obvious, where a man goes down and looks around to see whether the brake is there, he would see it? A. Yes sir, it is in plain sight.

Q. The main frame of the brakes are under the engine, isn't it?

A. The shoes are right on the face of the driving wheel.

Q. But the balance of the brake is right under the engine, isn't it?

A. No sir the rods and the levers are, but the cylinder and fulcrum are outside the frame, if there is a driving brake on the engine.

Q. What you call the shoe comes right over the wheel?

A. Comes on the face of the driving wheel.

101 J. T. Wells, a witness for defendant, testified as follows:

Q. What were you doing on the 30th of last October?

A. I was train dispatcher for the C., O. & G. R. R.

Q. Do you remember the night that an engine went off the track over east of Brinkley?

A. Yes sir.

Q. With engineer Davis and Fireman Holloway?

A. Yes sir.

Q. Who was directing the movements of the engine that night? A. Well, I was dispatcher on duty.

Q. You had charge of the trains then, did you?

A. Yes sir.

Q. I will just get you to tell the jury what orders you gave, how come you to give them, &c., that night with respect to the running of this engine from Brinkley to Hulbert?

A. The engine left Hulbert at 1:05 p. m. We had started it into Little Rock for repairs, and on the way from Hulbert to Brinkley, there was another engine broke down at Hulbert which was in worse fix than this one, and we stopped this engine at Brinkley, and waited until we heard from the other engine to see which could be repaired first, and it was decided to run this engine 3 back to Hulbert to take the place of the other one, as it was in better shape than the one at Hulbert, and they had to do some work on this engine 3 before it could go back, had some brasses to put in; that and one thing and another. It got there about seven o'clock in the evening, and it was nine or ten o'clock before it was ready to go back, and there was another train, a freight train there at the time, going east, about the time that engine was ready to go, and they were complaining about wanting rest, and we had no other crew there that I knew of to take the engine in case they called for rest, and I tried to get them out of there as soon as we could.

Q. You say they were complaining for rest?

102 A. Well, I understood that the fireman had said that if they didn't get out of there right away, he intended—

Q. Just testify what took place with reference to turning the engine?

A. Well, there was considerable correspondence between myself and the operator at Brinkley with regard to the engine getting out of there, and how it should go, and the delay that was going on, and he said something about turning the engine, about the engine being headed west, and I don't remember whether he wanted to ask for an order to have it turned or not, but I don't think he did.

Q. (By the Court): What were your instructions?

A. Why, I told him to let them go which ever way they wanted to go. I told them if they wanted to back up all right, and if they didn't all right. I didn't give him any positive instructions either way until they decided to go, and then I gave them their orders

Q. (Counsel for Defendant): After they decided which way they would go? A. They decided to go.

Cross-Examination.

Q. Have you got a copy of that telegram that you sent?

A. I have got a copy of the order.

Q. Will you read that please?

A. "No. 83. C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, Engines 31 and 17, and will back up carefully." Davis signed the order at 10:12.

Q. That is the order you gave them?
A. Yes sir, that was the last that I had to do with the engine.
Q. That was the last order that you gave them?
A. Yes sir.
Q. What order did you give them prior to that time?
A. I didn't give them any on this trip, as they were starting out.

Q. How did they have any information that they
103 should go back, unless an order from you?

A. They had decided to go back in the way I understood it.
Q. Decided to go back without any orders from this end of the line?
A. No sir, that was the order they got after they had decided to go and was ready.
Q. What information did they have, however, to go back before you sent them that order?
A. Oh, they had an order there. I think Mr. Roberts was instructed to send them back to Hulbert. He was the foreman in charge of the round house.
Q. You were the dispatcher here? A. Yes sir.
Q. All you know about it other than what appears there (on dispatcher's order book) is your information you got from the other end of the line?
A. Yes sir, from the operator at Brinkley.
Q. You know nothing about it from your own personal knowledge? A. No sir, I was not on the ground.
Q. Did you keep any copy of any other telegram?
A. There was no other telegram sent. It was all conversation.
Q. Well, it was conversation over the line?
A. Yes sir.
Q. Was there anything else reduced to writing?
A. No sir this is the only writing that we have of it.
Q. This is the only writing that you have at this end of the line? A. Yes sir.
Q. What was the name of the operator at the other end of the line? A. His name is Bolinger.
Q. Where is he? A. He is in Oklahoma, I think.
Q. When did you see him last?
A. I haven't seen him for about a week.

Q. Wasn't he here after this case was set for trial?
104 A. Yes sir.

Q. Where is he now?
A. He is out in Oklahoma, I think. He got a pass to go there.

Q. He got a pass from you?
A. From the superintendent here.
Q. Superintendent of the Choctaw Railroad?
A. Yes sir.
Q. To go to Oklahoma? A. Yes sir.
Q. About a week ago? A. About that.

Redirect Examination.

Q. You say that Holloway was kicking for rest?
A. That is what the operator told me.
Q. I will ask you if the fireman would have had a right to demand rest?
A. Yes sir, any man has a right to demand rest.
Q. After he had been out as long as Holloway?
A. Yes sir.
Q. If he had have demanded it, would you have given it to him?
A. Yes sir, we have to. We are instructed to give men rest if they demand it, when they have been on the road.

105 Defendant thereupon read to the jury the deposition of W. H. Davis, taken by the plaintiff, at Denison, Texas, as follows:
Q. What is your name, age and occupation?
A. W. H. Davis; age 28 years; occupation, at present, that of brakeman on the M. K. & T. Ry. Co.
Q What was your occupation in Oct., 1900?
A. Engineer on the Choctaw, Oklahoma & Gulf R. R. Co.
Q. How long have you been an engineer?
A. I was first made an engineer about eight years ago.
Q. How long had you been an engineer on the Choctaw? when you left their employ? A. About eight months.
Q. Were you engineer on Engine No. 3 W. & B., on or about Oct. 30th, 1900? A. Yes.
Q. Where did you receive that engine?
A. At Hulbert.
Q. From whom did you receive that engine?
A. I think it was from Engineer Waters, of Hulbert, Ark., where he temporarily lived.
Q. How far did you run, from what point and to what point? A. From Hulbert to Brinkley, about 60 miles.
Q. About what time did you reach Brinkley on the night of Oct. 30th, 1900? A. About seven o'clock p. m.
Q. Did you have any telegraphic orders to take your engine from Hulbert to Brinkley? A. Yes.
Q. Have you those orders now, or a copy of them?
A. No.

Q. State in substance the order, if you have not the original or a copy thereof?

A. About as follows: "Engine W. & B. 3 run as first thirteen from Hulbert to Brinkley."

106 Q. Did you receive any order to bring it on to Little Rock? A. No.

Q. What time did you reach Brinkley on the night of Oct. 30th, 1900? A. About 7:00 p. m.

Q. What further orders did you receive there in regard to the movement of your engine?

A. To take the engine back to Hulbert.

Q. From whom did you receive these instructions to take the engine back, and when?

A. From the Chief Dispatcher, the same night about 10:00 o'clock p. m.

Q. These orders were telegraphed to you at Brinkley?

A. Yes.

Q. Have you the original of that order?

A. No but I have just stated the substance of it.

Q. Was there any request made by you or your fireman to the train dispatcher for permission to reverse the engine?

A. I do not remember of any such request being made by myself or by my fireman.

Q. In what manner did you start your engine from Brinkley to go back to Hulbert?

A. I started the engine east, backing up.

Q. How far did you proceed in that manner?

A. Between 12 and 15 miles.

Q. Then what happened? A. I run over a horse.

Q. At what rate of speed was you going when you ran over the horse? A. About seven miles an hour.

Q. Were you keeping a lookout when you ran over the horse? A. Yes.

Q. If you were keeping a lookout, how far ahead was the horse when it was first discovered?

107 A. I did not see the horse until we had ran over it, and had stopped.

Q. Did you apply your brakes at all?

A. I did not until after I had ran over the horse.

Q. Did you stay on your engine?

A. I stayed on my engine until it had very nearly stopped. It ran half its length after I got off of it.

Q. Did you apply brakes to check speed of train, or to stop it? A. I applied the brakes to stop.

Q. What brake did you apply?

A. Automatic air brake.

Q. Is the road fenced at the point along where the accident occurred? A. Yes, I think it was.

Q. Who was your fireman on that run?
A. Will Holloway.
Q. How and where did the horse get on the track?
A. I do not know anything about that, except that it got on the track about five feet from the trestle.
Q. The engine was derailed by running over the horse, was it not?
A. Yes, I think that was what the cause of it was.
Q. Were there any gaps in the fence along there?
A. None that I knew of.
Q. You suppose the fence to be in good condition there?
A. Yes.

Cross-Examination.

Q. Had Holloway made the trip with you that day from Hulbert to Brinkley? A. Yes.
Q. Are you positive that the track was fenced, at the point where the accident occurred?
A. I had passed there many times before and do not remember of seeing any place along there that was not fenced.
Q. For what distance was the track fenced?
A. I do not remember, and do not know exactly.
Q. Can you tell about how far?
A. From near Goodwin to Forrest City, a distance of about twenty-two miles.
Q. The fact that the engine was going to back up from Brinkley to Hulbert was as well known to Holloway as any one else, was it not? A. Yes.
Q. What prevented you from seeing the horse before you struck it?
A. The horse was of a dark color and it was a dark night, and the horse did not come up on the track on my side, according to the tracks found on the dump where it came on the railroad track.
108 Q. When you applied the brakes, did they act promptly and make the proper stop of the engine?
A. Yes, it made a good stop.

Re-Direct-Examination.

Q. You say that the fact that the engine was going to back up from Brinkley to Hulbert was as well known to Holloway as any one else, please say what you mean by that?
A. I mean that I read the orders to him and showed him the orders.
Q. It was your duty to show him the orders? A. Yes.
Q. You speak of examining the tracks of the horse in your cross-examination, how far did you examine the tracks?
A. About five or six feet from the trestle.

Q. You just stopped then examining the tracks?

A. Because that was as far as I could see the tracks.

Q. What color was that horse?

A. A dark color, it might have been a black and it might have been a brown.

Q. Mr. Davis, please state if you did not have a conversation with J. W. House, and was not Will Holloway present, at your boarding house in Argenta, Ark., and afterwards another conversation at the office of J. W. House, 2nd & La. St., in the City of Little Rock, Ark., and in these conversations, or either of them, did you not say, that you were keeping a constant lookout and that when you first saw what afterwards proved to be a horse on the track, that you thought at first it was a shadow, and afterwards when you saw that it was a horse, or impediment of some kind, or some obstruction on the road, that such obstacles was 30 to 50 feet in front of tank; that you immediately applied the brakes, but could not stop the engine until it struck the horse?

A. Will Holloway was never present at any conversation between Mr. House and I. So far as me making any statement to Mr. House in regard to seeing anything on the track from 30 to 50 feet in front of tank, I did not make any such statement.

109 Q. What did you state to Mr. House in these conversations, or either of them?

A. I only remember of having one conversation with Mr. House, and that was at my boarding house in Argenta, with Mr. House alone, and all the conversation I remember of having with Mr. House was saying to him that Holloway was firing for me and that we run over the horse, and Mr. House asked me if I had the orders that I received that night. I told him I did at that present time, and further, I did state to him that [—] was keeping a constant lookout.

Q. Did you receive a letter from Mr. House, asking permission to take your deposition, said letter being dated April 8th, 1901, and addressed to you at Muscogee, I. T.?

A. Certainly, I received the letter.

Q. Did not that letter reach you at Denison, Texas?

A. It did.

Q. Did you not answer that letter?

A. As well as I remember, I did.

Q. Is this your letter in reply to that? A. Yes.

Q. If so please mark it for identification and have it attached to these answers as Exhibit A. A. All right.

Q. Did you not receive a second letter from J. W. House dated April 16, 1901, addressed to you at Denison, Tex.?

A. Yes, about that date.

Q. Is this the letter you wrote in reply to that letter?

A. Yes.

Q. If so, please mark for identification and have it attached to these answers as Exhibit B? A. All right.

Q. Did you not receive a third letter from J. W. House, directed to you at Denison, dated April the 22nd, 1901?

A. Yes, about that date.

Q. Is this letter you wrote in reply to that letter? A. [—]

Q. If so, please mark it for identification and have it attached to these answers marked exhibit C?

110 A. All right.

Q. Did you not receive a fourth letter from J. W. House, dated April 25th, 1901, addressed to you at Denison?

A. I think I did about that date.

Q. Did you answer that letter? A. I did not.

Q. Have you the first of these letters, the one addressed to you at Muscogee? A. I have not.

Q. Where is it? A. I could not say where it is.

Q. Did you not, after receiving the first letter from J. W. House send it to the defendant company, and did not you ask for a job there again?

A. I did not send it to the company.

Q. To whom did you send that letter, and where to?

A. To Mr. S. H. Barnes, at Little Rock, Ark.

Q. Is he an employee of the defendant Company?

A. He was when I left there.

Q. What was his position? A. Train Master.

Q. Does he hold that position yet? A. I do not know.

Q. Did you think he held it when you sent him the letter?

A. I did.

Q. Did you ask through him for a job with the defendant company?

A. I do not exactly remember whether I did or did not.

Q. Why did you send Mr. Barnes Mr. House's first letter?

A. I consider that that is my business; that ought to be enough.

Q. Then you refuse to answer the question? A. Yes.

Q. Do you pretend to say Mr. Davis that you don't remember whether you asked Mr. Barnes, or through him, for a job with the defendant Company when you sent Mr. House's letter to Mr. Barnes?

111 A. I do not remember whether I did ro did not.

Q. Have you asked for a job with the defendant Company since sending Mr. House's letter to Mr. Barnes?

A. Nothing more I believe, than to ask to be re-employed.

Q. How, when and from whom did you ask to be employed?

A. I wrote to Mr. Harris, the General Superintendent, at Little Rock, about the 10th or 15th of April, 1901.

Q. Did you write or ask any one else for a job with the defendant Company? A. Not as I remember of.

Q. If you had written such a request to anyone else, would you not have remembered it?

A. I do not know if I would or if I would not have remembered it.

Q. How is it that you remember so well about the letter you wrote to Mr. Harris and do not remember whether you wrote any other letter or not?

A. This was the first letter I wrote.

Q. What did you do with Mr. House's second letter as above mentioned?

A. I think I have it on my person.

Q. What with the third, and with the fourth?

A. They also are on my person.

Recross-Examination.

Q. Has the Choctaw Ry. Co., or anybody for them, either directly or indirectly made you any promise of re-employment?

A. They have not.

Q. Did you ever receive an answer to your application to Mr. Harris? A. No.

Q. Please state about how long before you left Brinkley on the night in question you showed Holloway your orders?

A. About the time we were leaving Brinkley.

112 Redirect Examination.

Q. How long before you left Brinkley did you receive those orders?

A. About 35 minutes as well as I remember.

Exhibits A, B and C to this deposition, were not read with the deposition, but were read by Mr. J. W. House in his testimony, and for that reason are not copied here.

For Exhibit "A," see folio 127 this record.
For Exhibit "B," see folio 128 this record.
For Exhibit "C," see folio 128 this record.

113 E. B. Peirce, Attorney for Defendant, testified as follows:

I just want to say, in regard to Mr. Bolinger, that up to about six or seven days ago, he was here in Little Rock; that is, he was in the employ of the Company, as I understand, and I made a requisition as the attorney for the road, for Mr. Bolinger. He came to my office and I had a talk with him and directed that he should be here to-day as a witness, and he stated then that he was going to go out somewhere west on the line, and would still be in the employ of the company, and I directed him then to go to the superintendent's office and

make arrangements there with the superintendent, before he left, for his attendance here to-day, and he promised to do so. It is not our custom, and we never have any witnesses on the railroad subpoenaed. The witnesses working for the Company come without any subpoena, and about two or three days ago, as is my usual custom, I begun to ascertain if all my witnesses understood the arrangement and day for trial, so that there could be no misapprehension, and I sent to the superintendent's office to know where Mr. Bolinger was, and to give them instructions again to send Mr Bolinger, and they stated to me that Mr. Bolinger had gone out west with the understanding that he would be back here to-day, and he had been properly provided with transportation and instructions. Now, why he is not here, I am unable to say, but I do say that it is not with the connivance, consent or permission of the defendant Railroad Company, because we intended and expected that he should be here to-day, and made all arrangements to that effect.

114 Y. E. Whitmore, a witness for Defendant, testified as follows:

Q. What are you doing?

A. I am a machinist in the employ of the Iron Mountain & Southern at Baring Cross shops.

Q. Where were you engaged on the 30th of last October?

A. I was employed as an engineer on the Choctaw, Oklahoma & Gulf.

Q. You are not now employed there? A. No sir.

Q. You are not in the employ of the Choctaw Road?

A. No sir.

Q. Mr. Whitmore, do you remember the night of October 30th, when the engine at trestle 547 was derailed? A. I do.

Q. When Fireman Holloway was on? A. Yes sir.

Q. Did you see Mr. Holloway that night? A. I did.

Q. Where did you see him?

A. I saw him at Brinkley before he left, and I saw him at the trestle after the accident.

Q. When you got down there, where did you first see him?

A. He flagged me about six or eight telegraph poles this side of the wreck and got on the engine.

Q. Was the engine moving or standing still at the time he got on? A. Moving about six or eight miles an hour.

Q. Did he tell you how he got his injury?

A. Why, he spoke of no injury at that time, said he was bruised up a little bit from getting off.

Q. Mr. Whitemore, are you acquainted with the White & Black Engine No. 3 that went off that night?

A. Well, yes sir, I looked at the engine after the accident, and I had seen her frequently before that.

115 Q. Do you know whether or not she had any brakes on the driving wheels?

A. No sir, I don't believe she had. I am positive she had not.

Q. Now, Mr. Whitmore, I will ask you if a fireman with several years' experience could travel from Hulbert to Brinkley, and part of the way back, without knowing whether an engine had brakes on the driving wheels?

A. No sir, it is hardly probable that he could; I don't think he could. In fact, the brakes on the locomotive is a very important thing, and anybody that has had five years experience as a fireman, or in the train service at all, would know whether there was driving brakes on the engine or not, as they are in a very conspicuous place.

Q. Do you think a fireman could, with any considerable experience, or any experience, ride from Hulbert to Brinkley, and part of the way back, and not know whether there were any brakes on the driving wheels?

A. No sir, I don't think he could.

Q. You say you saw them at Brinkley before they started?

A. Yes sir.

Q. Were they moving the engine around there any?

A. Yes sir.

Q. What movements did they make of it? I will just ask you this: Do you know whether Holloway was on the engine moving it or not?

A. He was on the engine, but the engineer was moving the engine.

Q. Moving around in the yards?

A. Yes sir, moving backwards and forward to get out of my way while I was doing some switching there.

Cross-Examination.

Q. You have stated that a fireman wouldn't probably ride on the engine that distance—now, a fireman's duty is to make the fire isn't it, and look after the fire?

A. Yes sir, his duty is to look after the fire, and as-

116 sist the engineer with his duties as much as possible. He takes and accepts the position as a fireman always with the prospects of going further. He accepts the position as a fireman to advance his position in life, and every fireman that you see—the engineer is foreman of the engine, he is the boss, you may say, he is recognized as the head, and the fireman is subject to the engineer's orders, and no fireman could

possibly be on an engine, with five years' experience, that wouldn't know whether there was a driving brake on the engine or not, at this day and time.

Q. He could see them distinctly, could he?

A. Yes sir, very distinctly.

Q. Suppose he was riding in the engine, could he see them then?

A. Yes sir, you can see them if you lean your head out of the cab window six inches, you could see the brakes. More than that, they have a triple valve right underneath the fireman, attached to what is called an auxiliary reservoir, and each time the brake is applied and let off, the air escapes from this triple valve and makes a whistling noise, and in the absence of brakes, that noise is not there.

Q. The absence of brakes anywhere?

A. No sir, there is a triple valve on both engine and tank, where there are brakes.

Here the defendant rested.

117 Plaintiff's Rebuttal.

Thereupon, the plaintiff, in rebuttal, introduced the following testimony:

W. F. Barger, being recalled, testified as follows:

Q. How long have you been braking on the railroad?

A. About seven years.

Q. Were you a head brakeman?

A. I have worked both on the head end and hind end.

Q. When you work as a head brakeman, where is your post of duty?

A. Going through stations, you are supposed to be out on top of the cars.

Q. How far from the engine? A. On the head car.

Q. Now, I will ask you if you ever noticed, when the brakes were turned on, if you could state about how far an engine and a tank would run after the brakes were turned on, where they were properly equipped with brakes?

(By the Court): Do you know it?

A. Why, if you are not going very fast.

Q. (By the Court): That is not the question? Do you know at all? A. Yes sir, I do.

Q. (Counsel for Plaintiff): You know the W. & B. engine No. 3, and the tank? A. Yes sir.

Q. Suppose that was going at the rate of about seven miles, not to exceed seven or eight miles an hour, with no cars behind it, nothing but the engine and the tank, how far would that run on level ground, going seven or eight miles an hour,

and where there was just the engine and the tank, and where both the engine and the tank were properly equipped with brakes, how far would that run before it would stop, after turning on the air brakes?

A. Why, about ninety feet, something like that, two rail lengths.

118 Q. If there were no brakes on the engine, take this engine, the same condition I have already stated, if there were no brakes on the engine, about how far would it go then before it could be stopped, with brakes on the tank and none on the engine?

A. Why, it would go further, of course; it would go about 100 or probably 125 feet.

Cross-Examination.

Q. Have you ever been an engineer?

A. No sir, I never have.

Q. You have had no practical experience along that line?

A. No sir.

Q. Would you pretend to tell this jury that a light engine, with no load to it, on a level track, and under perfect control, with brakes perfectly equipped on the tank, couldn't stop in 45 or 50 feet? Would you pretend to tell this jury that?

A. I have always seen it.

Q. Just answer the question. Would you pretend to tell this jury that an engine properly equipped with brakes on the tender, light engine, under perfect control, could not be stopped in 45 or 50 feet?

A. As far as my knowledge, I don't think it could. Of course, I might be mistaken.

Q. Do you have enough knowledge to speak definitely about it one way or the other? Do you say it could not be done? A. I do not think it could be done, no sir.

119 ..... Farrell, a witness for plaintiff, testified as follows:

Q. What business are you engaged in? A. Fireman.

Q. For the Choctaw & Memphis?

A. Choctaw, Oklahoma & Gulf, yes sir.

Q. How long have you been fireman?

A. Something like ten or eleven months.

Q. Do you have occasion to observe the effect of turning on the brakes—air brakes—on a train, and what length of time it can ordinarily be stopped? Has your attention ever been called to that as a fireman? A. Yes sir.

Q. I will ask you if you can state from your experience and observation how far an engine and a tank—you know this engine No. 3, W. & B., do you? A. Yes sir.

Q. Take an engine like that, and the same tank, on a level road, where both the engine and the tank are properly equipped with air brakes, how far would they run after the air brake was applied to the engine and to the tank, ordinarily, on a level road?

A. Well, it is owing to how fast the engine was running at the time.

Q. Say running at a speed of seven or eight miles an hour?

A. Well, it ought to stop within 60 or 75 feet.

Q. Suppose there are no brakes on the engine, but brakes on the tank, how far would it go?

A. I think it would run 40 or 50 feet further, something like that.

Cross-Examination.

Q. What you have stated is not from any actual experience, is it, in running an engine? A. No sir, I never ran an engine.

120 Q. Do you pretend to tell the jury that with a light engine like the W. & B. No. 3, with the air brakes in perfect condition on the tender, and the engine under perfect control, that it could not be stopped in 45 or 50 feet?

A. Yes sir. I have been on light engines is the reason why.

Q. I ask you if you undertake to tell the jury positively if it could not be done? Can it, or can it not?

A. I stated while ago, I didn't think it would stop within less than 60 or 75 feet.

Q. You have never had any experience as an engineer, have you? A No sir, I never ran an engine.

Q. (By the Court): If you was a fireman, you would have occasion to watch it? A. Yes sir.

Q. How long does it take it to stop if it was running at the rate of six or seven miles an hour, regular train with [a] loaded cars?

A. Well, that would be owing to how many cars you had, how many loads.

Q. Well, compared to the length of the train?

A. Well, it would run something like that length, a couple of telegraph poles, something like that.

Q. Suppose there were two cars attached, how long would it take?

A. You would stop in less distance, certainly, because there would be less force.

Q. Less than half the length of the train or more?

A. Oh, if there were only two trains, you would undoubtedly run further than two car lengths before you could stop.

Q. It would run two car lengths? A. I think it would.

121 Will Holloway, Plaintiff testified as follows:

Q. You were on the witness stand yesterday, and something was said about being able to see the brakes on an engine by standing in the cab where it was your place to stand, and looking out in front, now state to the jury if that is true, and if not true, state why it is not true?

A. No sir, you cannot see that at all from standing on the inside of the cab, by sitting in there on the seat. As I told you, the cab comes up here; just by the side of you is a window. There is a window direct in front of you, I suppose you may say it was 3½ feet to the front. There is a board something like this. It is supposed to be anywhere from 28 to 32 inches wide; that comes right along by the side of the boiler. Your seat is right up on top of this.

Q. Your seat is in top of the board in the cab?

A. Yes sir, the cab is built on this board that runs right straight with the boiler. The board runs continuously to the far end of the boiler. The back driver sets right under here, directly under the fireman's seat, a short distance ahead of that is the second driver, and between these two drivers are the brakes, and you cannot possibly sit here and look out there and see the brake by any means?

Q. Can you stand there and see the brakes?

A. No sir, you have got to lean out of the window and look over to see the brakes?

Q. Did you make an examination yesterday in reference to this matter? I will ask you if you examined an engine that was constructed like the one you were on?

A. Yes sir, it was a Roger engine?

Q. Was the engine that you were on constructed similar to the engines that you examined yesterday evening?

A. Yes sir.

Q. You examined these in my presence? A. Yes sir.

Q. I will ask you—that board that you speak of that
122 runs out—that is your board that is on the inside of the cab, and it projects out beyond the window, like you are looking out of the window here, this board projects out here how many inches? A. 21½.

Q. How wide is this board? A. 25 inches.

Q. Where is this brake situated in reference to this board?

A. The first wheel would be sitting here right direct under the fireman's seat. He rides over the back driver. The next driver is just enough ahead to allow two brakes between the two.

Q. Now, I understand you that this board obstructs the view so that you couldn't stand and see it? A. No sir.

Q. The brake, as I understand you, is immediately under the end of this board? A. Yes sir.

Q. Did you say how far out you would have to look out to one side in order to see that brake?

A. Looking out of the side window, you have to balance yourself. It is about twenty inches that you have got to straighten out, before you can get over to see these brakes.

Q. Kind of a strain before you can see these brakes at all?

A. Yes sir, you would have to balance yourself on the window sill.

Q. Now, I understand you that in looking out of the front window, where it is the duty of the brakeman or the engineer to stand, that you cannot see the brake, by reason of this board that goes out in front?

A. No sir, you cannot see it by sitting down on my seat, the place where the fireman sits.

Q. Can you see it and stand up?

A. You can if you step to the window and look over. You understand these two back boards are double; they pass clear outside the cab; they pass from 18 to 20 inches; the eight
123 wheel engines are a little different from the ten wheelers; that board comes back, and it is under the edge of that board; you cannot observe the brake.

Q. You heard Mr. Roberts' statement here on the witness stand about the conversation he had with Davis, in which he said that you were present? Were you present at any conversation he had with him about authorizing you to go to sleep and they would wake you up at four o'clock in the morning?

A. I never was in Mr. Robert's company one minute in my life.

Q. Was any such conversation as that had?

A. None that I ever knew of.

Q. Mr. Whitmore, the gentleman who went down there? You stated yesterday that you didn't get on your engine until it stopped? A. Standing perfectly still.

Q. Did you make any statement to him that you got hurt in falling from the train or from the car?

A. No sir, I made no statement to Mr. Whitmore whatever in regard to this matter.

Q. Have you ever made any statement other than the ones you have made here in your statement before the jury as to this injury?

A. Yes sir, I made that personal injury statement.

Q. Have you ever made any statement different from that that you are aware of?

A. No sir, I made no statement different from that, the one that went to the officials.

Q. I see in Davis' deposition, he says that you were keeping a lookout, and he didn't see the horse until he had run over it and had stopped. I will ask you if you had a conversation in my office, or if Davis and myself, when you were

present, all three of us present in my office, on one or more occasions, had a conversation in reference to how this accident occurred?

A. Yes sir, we came to your office together. He come to see you on the same business, in regard to his case, and you was talking concerning this matter, all about it, and he said to you that when he first noticed the object on the track, it was somewhere from 40 to 60 feet ahead; on first observing this object, he thought it was merely a shadow, but at
124 an instant, he realized that it was an object of some kind, or obstruction, and applied his air, and at the same time he applied his air, he hallooed to me to give me an opportunity to get out.

Q. Mr. Davis said something about the tracks of the horse. Did you have occasion to observe the tracks back from where you struck the horse?

A. After I had left my engine, going back to flag Mr. Whitmore, who was following us, I had a red light in my right hand, and a large torch that was used on engines in my left, and on going up the track of the railroad, the tracks of the horse were very plain where he was running in the center of the track, going on ahead of us, as far up as I had gone, something like 100 yards.

Q. How many conversations did you have with Davis? Was Davis in my office when you were present and we talked this matter over?

A. We had two conversations in your office and you were present at both.

Q. Do you recollect what he said to me in regard to the telegram that you received and the telegrahpic orders?

A. You asked him for the order, and he admitted, I believe, having the order and said that he would show it up at the proper time, is about the words, I recollect.

Q. Do you recollect what he told me about the substance of the orders that he had to back his train to Hulbert?

A. Yes sir, he said he had orders to back it there.

Q. You say you tracked the horse how far?

A. As far as I had gone, something about 100 yards. I suppose it might have been a little more, or a little less.

Q. Were they on the railroad track?

A. Yes sir, they were on the railroad track. I was walking up the middle of the track.

Q. You were going back to flag the train?

A. Yes sir, I was going back to flag Whitmore.

125 Cross-Examination.

Q. Do you know when these tracks were made there?

A. From the way they looked, they seemed to be very fresh, and looked like they were made by a horse running.

Q. Did you stop to inspect the tracks?

A. Yes sir, I watched them very carefully, because we killed the horse.

Q. Now, that running board that you speak of stands above the driving wheels, doesn't it? A. Yes sir.

Q. Runs very near the top of the boiler?

A. No sir, not near the top, only the center of the boiler.

Q. The driving wheels are under that? A. Yes sir.

Q. If you lean your head out of the cab, you can see the driving wheels?

A. You can if you lean out far enough.

Q. Can you see something of the driving wheels sitting in your seat in the cab?

A. You may see the front ones. You may see the third wheel, but I don't think you can see any more than the far edge of the rim of the middle wheel. I never tested that at all. I don't know exactly.

Q. You just sit up there and didn't look to see?

A. I had no occasion to. I am no engine inspector or engineer. I am a locomotive fireman, and I fill that.

Redirect Examination.

Q. How is the track over here as to being level or hilly from Brinkley to Hulbert?

A. The track is comparatively level through the bottom country. The road is throwed up and made.

Cross-Examination.

Q. How much switching did you all do in the yard at Brinkley that night?

126 A. We headed in on the passing track next to the main line, and then we headed in on the house track in order to let Mr. Whitmore pass and cut his train in two below us.

Q. You were getting out of the way of his train?

A. I wasn't doing any switching at all myself.

Q. You were on the engine? A. No sir.

Q. Where were you?

A. I was throwing the switch. I was acting in the capacity of two men, fireman and brakeman.

127 Mr. Jos. W. House, Attorney for Plaintiff, testified as follows:

I desire to read the correspondence between W. H. Davis and myself.

"W. H. Davis, Esq.,
C-o M. K. & T. R. R. Shops,
Muscogee, I. T.

Dear Sir: The case of Will Holloway will be up for trial in some two or three weeks, and I may want to take your deposition. Will you please write me at once if I can take your deposition in some law office in Muscogee; also, please let me know if you still have the telegram which you received that night. I am informed by Mr. Holloway that the brakes on the engine were out of repair on the night of the accident. Let me know if this is true, and when you first knew that they were out of repair. As you will have no use for the telegrams, I will be obliged if you would send them to me, and I can then use them on the trial. Please write me at once. I herewith enclose stamped envelope for your reply.

(Signed) J. W. HOUSE."

This letter was dated April 8th. I received in reply to that the following letter, which is attached to the deposition; and marked Exhibit A, as follows:

"Denison, Tex. April 14, 1901.

Mr. J. W. House,
Little Rock, Ark.

Dear Sir: Your letter of the 8 just received this a. m. and was glad to hear from you, but will say in regard the deposition which you speak of in Will Holloway case, if the case comes up, don't you think it would be better for me to be present as a witness. I am not so busy that I can't come back to Little Rock. How do you expect to win the case without witnesses in the case? I will be glad to do everything I can to help Holloway out?

Please let me hear from you soon.

Very respy. yours,

W. H. DAVIS,
113 Gandy St., Denison, Tex."

On the 16th, I wrote to him as follows:

"W. H. Davis, Esq.,
Denison, Texas.

My Dear Sir: I have just received your letter of the 14th inst., and was indeed very glad to hear from you. I would much prefer to have you here than to take your deposition, and if I knew what your evidence would be along the lines which I wrote you, I would be still more anxious to have you

here. As far as the telegram is concerned, I think the company will admit they were sent just as we have stated, but Will Holloway tells me that when the injury happened, you and he examined the brakes and saw that the brakes on the engine did not clasp the wheels, while the wheels of the tank in front were clasped by the shoes, thus showing that the brakes on the engine did not work. I would be obliged if you would let me know what your recollection is about this matter; that is to say, whether the brakes were in fix to work or not; if not, how long had they been out of repair. I would not agree to go to the expense of having you to come unless I knew what your testimony would be. The case is set down for the 6th of May. Will Holloway is not here now, but will be in a day or two and I can talk to him about the propriety of requesting you to return. Of course, I would be glad to have you here as a witness anyhow, but unless your testimony would be of some importance to us, it would be useless
128 for us to take your deposition, or for you to come.
Please let me hear from you and I will write you further. Yours truly,

J. W. HOUSE."

In reply to that, I received the following letter, which is attached to the deposition as Exhibit B:

"Denison, Tex., April 18, 1901.

Mr. J. W. House,

Dear Sir: Your letter just received and was pleased to hear from you and will say in regards to the case, I am very glad to know that it is set off for a few days. Mr. House, you spoke in your last letter about expenses in having me come back to Little Rock. I am a friend to Will Holloway, and I am sure I wouldn't do him any harm, and furthermore, I think I could be of a great help to you in the case in making it stronger. There are some things that probably Will Holloway don't remember. By the way, I understand your letter, and in such a case, I believe I would be a great help to you. Of course, understand me that I am not trying to force myself on as a witness, if I didn't think I was worth to you what it would cost you for my expenses, I wouldn't want to come, as I hope you may have great success in gaining the case, as I believe you are aware of the fact that the Gen. Supt. of the C., O. & G. R. R. Co. discharged me some time ago, and I don't think they had much grounds to do such as to discharge me, and so far as remembering things what happened, I believe I am good at such things, and probably would know

more than I would care to write. But if you are going to use me for a witness, I don't think that you will ever regret it. I will close for this time. Very resp. yours,

W. H. DAVIS,
113 East Gandy St., Denison, Tex."

In reply to that, I wrote on April 22nd, 1901, as follows:

"W. H. Davis, Esq.,

My Dear Sir: I have seen Mr. Holloway, and he has agreed to pay your expenses here, if you will return. I can arrange here to get you a pass over the road, and will agree to pay your other incidental expenses upon your trip here when you arrive, or if you prefer, I can send you enough money to buy your ticket to this place. In any event, I want you to come and bring all the telegrams with you that you received the night of this accident. Now, I shall expect you to come, and when you do so, to come to my office at once, as I wish to talk with you before I put you on the witness stand.

Yours truly,
J. W. HOUSE."

In reply to that, I received letter, which is attached as Exhibit C to deposition, as follows:

"Denison, Texas, April 24, 1901.

Mr. J. W. House,

Dear Sir: Your letter received and was very glad to hear from you. In regards to expenses, please send me about $35.00 on account of expenses, and tell me where to come. I think it would be the best for me to be there a few days ahead of the trial. I shall expect all other expenses when I get to Little Rock, Ark. Very resp. yours,

W. H. DAVIS.

P. S. Answer at once, and tell me something near the amount of expense you will allow me. Answer at once."

In reply to that, I wrote April 25th, 1901, as follows:

129 "W. H. Davis,

My Dear Sir: I am just in receipt of your letter of the 24th inst. I am unwilling to send you as much as $35.00 to pay your expenses here. Your railroad fare here would be about $9.00. I am willing to send you $10 and pay you $1.50 per day while here for your expenses, and if you then desire to go back to Denison, to pay your expenses back. Your demand is entirely unreasonable, and I do not have to depend on your evidence for success in this case. You can either accept this or not, just as you like. Yours truly,

J. W. HOUSE."

Now, I wish to state further that Davis was in my office three times, as I remember. Once he came alone to advise with me about bringing his own suit, a suit against the railroad company for the same thing. He advised me that he had given the Company a receipt in full for all damages, and I told him, under the law, that he couldn't recover; that that was a contract, he had accepted whatever it was, and he had to abide by it. That was after the two conversations I had when Mr. Holloway was present in my office, and I talked with him fully, as I always do witnesses in any case that I have, in reference to what we could show by him in reference to the telegrams. He said the telegrams were over at his house, and he would produce them either at his deposition or in court. He told me in substance what they were, as has been shown by the other evidence in this case, and he said too, substantially as Mr. Holloway stated, that he saw some object at first; he thought it was a shadow. I am not stating anything unless I think it is in his deposition. I don't care anything about it, except that he states that he had no conversation with Will Holloway in my office at all. He stated that he immediately saw that it was some obstruction in the way and he applied the brakes at once, and my recollection is, he said it was anywhere from 40 or 50 or 60 feet in front of the engine when he first observed it. That is my recollection as to his statement; that is all I desire to state.

Defendant here read in evidence the following rule:

"200. Every person accepting a position with this company does so with the full knowledge of the dangers incident to the operating of railroads, and is required to exercise great care
in the performance of his duties, to prevent accident to
130 himself or others, and to see that the machinery or tools
which he is to use are in a safe condition to perform the services required and to report defects as per rule 203."

This was all the testimony in the case on both sides.

131 By consent of parties, the jury was to view the locomotive, or one exactly like the locomotive, on which plaintiff was at the time of the accident. Whereupon, the Court gave the following instructions to the jury in relation to this matter:

Gentlemen of the jury, you have the right to look at it.

(In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a

man is employed for several hours doing work on the engine as a fireman, i. e. whether he could easily see them by just keeping his eyes open.)

To the giving of the above paragraph of said instructions, enclosed in parenthesis, the defendant at the proper time objected and saved its proper exceptions.

(Now, the Court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employee has the right to rely upon that fact, without any examination made by himself, that the Company did furnish him with reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the Company before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason he was told that they want it taken to the shops, or "you must be careful with it, because there are certain defects in this machinery." If these are pointed out to him, then he assumes the risk, if he goes on it.)

To the giving of the above paragraph of said instructions, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

132 But, on the other hand, I also want to call your attention, and that is the reason you are taken there now, to another matter. A man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open.

Now, if for that reason, that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours, (without hunting for it) then the Court will tell you that he had knowledge of and ought to have known of it, and he is chargeable with it, as if he had known it.

(To the giving of that part of the above paragraph enclosed in brackets, being the words "without hunting for it," the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.)

(Now, you, gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duties as a fireman, he was bound to have noticed it, then the law supposed that he had notice of it.)

To the giving of the above paragraph of said instructions, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

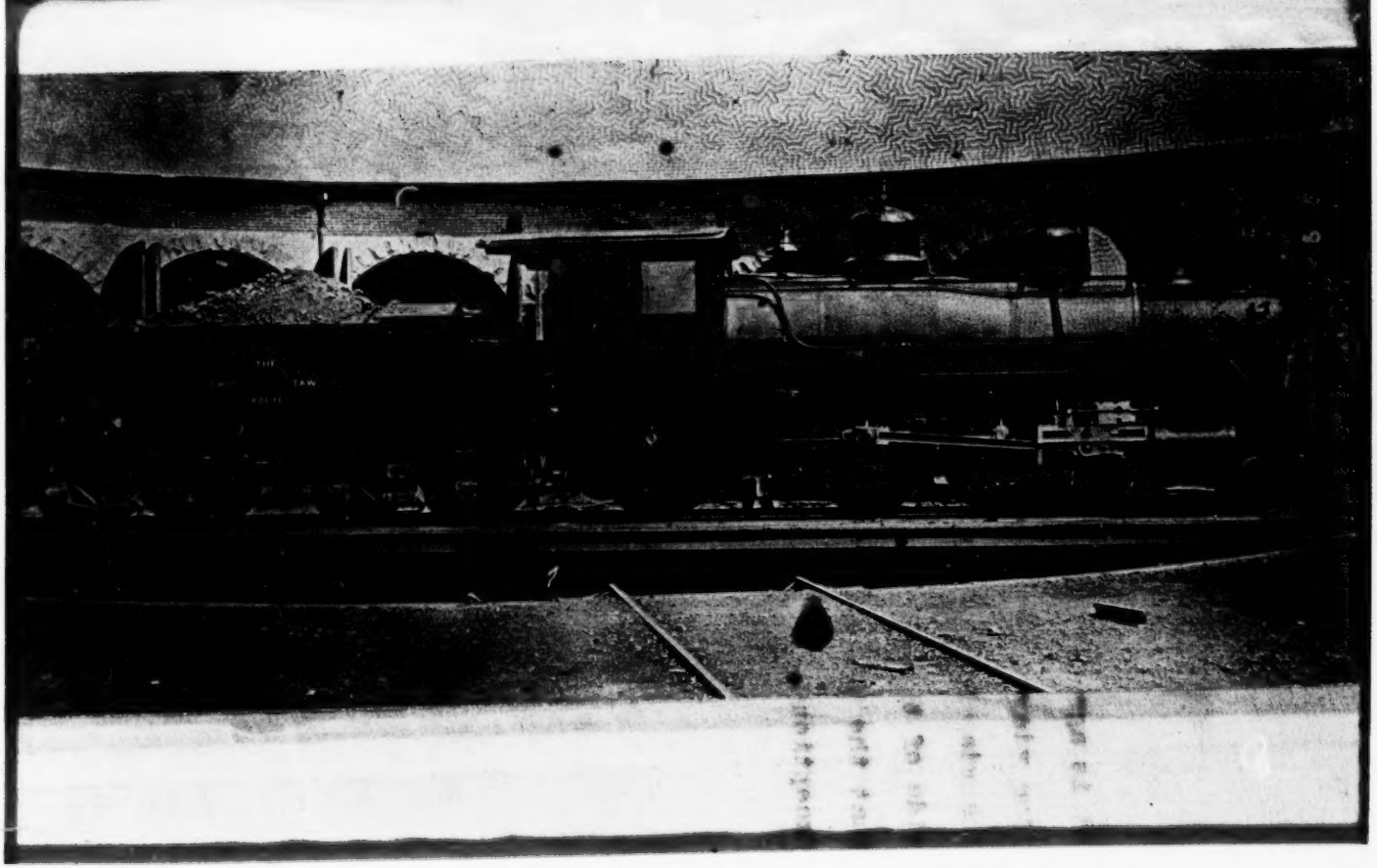
(If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion.)

133 To the giving of the above paragraph of said instructions enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

Of course, you need not report to the court what you saw, or what conclusions you reach. That will be for you to determine when you retire to the jury room for the purpose of making up your verdict, and you are only taken down there for the purpose of looking at the locomotive, as part of the evidence in this case, as there seems to be a conflict, some of the witnesses testifying that they can't help but see it, and the plaintiff himself says that he did not see it, although he acted as a reasonably prudent man, and that his attention was not called to it.

If a reasonably prudent person, employed as a fireman, having taken a trip of six hours duration on it, getting on and getting off for that purpose, and then again getting on for the purpose of making his trip, if a reasonably prudent person who is exercising ordinary diligence, could have seen it, then he will be chargeable with it, but he need not hunt for it and need not look for it; he has a right to presume that it was a reasonably safe machine, or if it was not, that his attention would be called to it.

The jury thereupon retired to view said engine, and a photograph of the engine viewed by them, by agreement of counsel, is hereto attached.



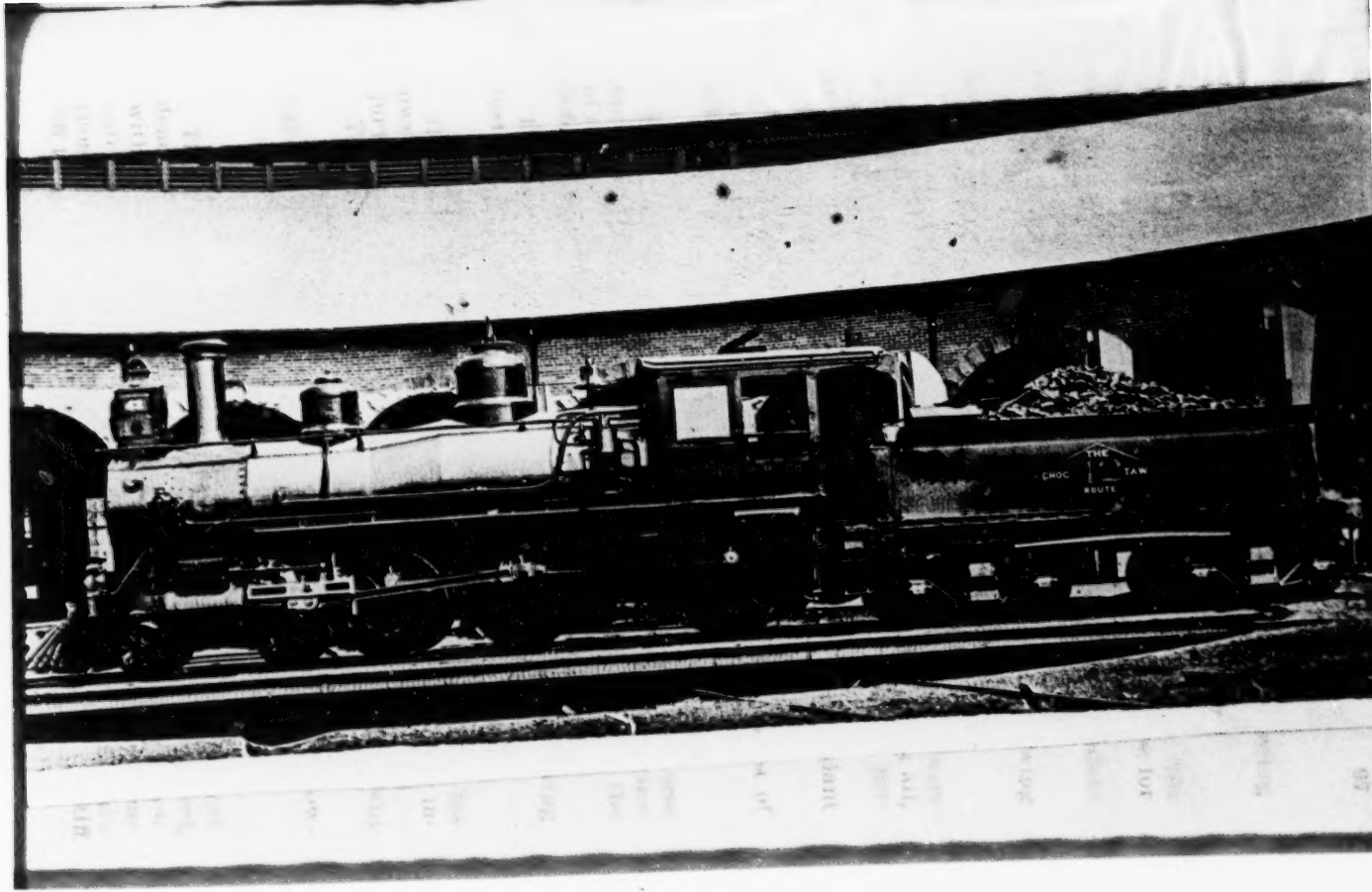
It is agreed that this is a picture of the engine introduced by the jury in this case, and that the plaintiff is taken looking at the engineer's side of the engine. And it is further agreed that the same may be incorporated in the Bill of Exceptions.

E. B. Peirce,

Attorney for Railroad.

J. W. House,

Attorney for Holloway.


THE
CHOC
TAW
ROUTE

It is agreed that this is a picture of the engine viewed by the jury in this case, and that the view is taken looking at the fireman's side of the engine. And it is further agreed that the same may be incorporated in the Bill of Exceptions.

E. B. Peirce,

Attorney for Railroad.

J. W. House,

Attorney for Holloway.

Instructions.

134 The defendant asked the Court to give the following instructions:

1.

The Court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instructions:

2.

The Court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge.

The Court refused to give said instruction, and the defendant saved its exceptions.

The Court gave the following instruction, at the request of defendant:

3.

The Court instructs the jury that the presence of the horse upon the track of the defendant railroad company at the time of the injury in this case was not negligence on the part of the defendant.

The defendant also asked the court to give the following instruction:

4.

If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant.

The Court refused to give said instruction, and the defendant saved its exceptions.

135 The defendant also asked the court to give the following instruction:

5.

The Court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff

would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether the plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

6.

The Court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

7.

The Court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows this engine was running, and that plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot
136 recover, and that too regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

8.

The Court instructs the jury that an employee is required to observe patent defects in the machinery about which he is employed and is bound to assume the risk incident thereto to the same extent as if their existence had been with his actual knowledge.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

9.

The Court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangerous and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him.

The Court refused to give said instruction, and the defendant saved its exceptions.

The defendant also asked the court to give the following instruction:

10.

You are instructed that if, before leaking Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then
137 his failure to take such precautions was negligence on his part, and will bar his recovery in this case, and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case.

The Court refused to give said instruction, and the defendant saved its exceptions.

Court's Charge.

The Court thereupon, of its own motion, charged the jury as follows:

Gentlemen of the jury: This is an action to recover damages for injuries alleged to have been sustained by the plaintiff while in the employ of the defendant railroad company, in an accident alleged to have been caused through the negligence of the railroad company. In actions of this kind the liability of a railroad is quite different from that in case of a passenger. The law governing the liability of a railroad for injuries sustained by an employe is that of master and servant. There is no greater liability assumed by a railroad toward its employes than that of any other employer, whether a corporation or an individual.

(The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to

furnish its employes working tools which are reasonably safe, and a place to work in, which is reasonably safe. If it does that then it has discharged its duty, and in case of accident to one of its employes it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected and saved its exceptions.

138 The burden of proof to establish the facts that the plaintiff was injured and that the injury occurred by reason of the negligence of the defendant, is on the plaintiff, and he must establish both of these facts by a preponderance of the evidence. The mere fact that he was injured while engaged in the service of the defendant is not sufficient to entitle him to a verdict; he must also show that he sustained the injury by reason of the defendant's negligence.

(Negligence in cases of this kind consists in the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

(The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleged injuries were sustained by him, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had,

must have known of the danger of riding on it, while running backward, without any headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a
139 fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.)

To the giving of the above paragraph of said charge enclosed in brackets, the defendant, at the proper time and in the proper manner, objected, and saved its proper exceptions.

(That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of the plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as a fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more.)

To the giving of the above paragraph of said charge enclosed in brackets, the defendant, in the proper manner and at the proper time, objected, and saved its proper exceptions.

But, if you find the facts otherwise, i. e., that he did not know this or could not have known it as a reasonably prudent person, then it will be necessary for you to determine other facts.

(In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and
140 found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious

defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years has been a locomotive fireman.)

To the giving of the above paragraph of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected, and saved its proper exceptions.

Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident would not have been prevented, even if there had been suitable brakes on the engine, then plaintiff cannot recover anything in this action, and your verdict should be for the defendant.

(On this issue the evidence is conflicting.)

To the giving of the above sentence of said charge, enclosed in brackets, the defendant at the proper time and in the proper manner, objected, and saved its proper exceptions.

Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

The plaintiff testified that, while he did not see the horse which caused the accident, the engineer called to him "look out, look out;" that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine, had it been supplied with proper brakes, but having no brakes on the engine, the failure to stop the engine as rapidly as could have been done if supplied with brakes caused the accident whereby plaintiff was injuried. On the other hand, the engineer testified that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so you are to take into consideration all the circumstances existing at the time; the kind of a night it was, the fact that the locomotive was running backward; that there was no light in front; that the engineer kept as good
141 a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact, whether, even if there had been brakes, the engine could have been stopped before striking the horse, after its presence on the track had been discovered by the engineer.

(If you find that the fact of the engine being without brakes was unknown to plaintiff and could not have been known to

him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff,) but if you find either of these facts the other way, your verdict should be for the defendant.

To the giving of that part of the above paragraph of said charge enclosed in brackets, commencing with the words "If you find that," and ending with the words "should be for the plaintiff" the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

If your verdict is for the plaintiff on these issues, the next thing for you to determine is, was he injured in this accident. If you find that he was, then he is entitled to compensation, as I shall fully explain to you, but if you find that he was not injured in that accident, he is, of course, not entitled to any verdict.

(The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident;)

To the giving of the above part of said charge enclosed in brackets, the defendant at the proper time and in the proper manner objected, and saved its proper exceptions.

(next, the loss of wages during the time that he has, by reason of these injuries, been incapacited from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what
142 he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter as, in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident.)

To the giving of the above part of said charge enclosed in brackets, the defendant, at the proper time and in the proper manner, objected, and saved its proper exceptions.

The table showing the probability of his life which have been introduced are not conclusive, but may be considered by you, with such other facts as your good sense and judgment tell you to use for the purpose of determining for how long, if at all, the plaintiff should receive such compensation. You

may also allow him compensation for the pain and suffering, if any, caused by this accident. This pain and suffering includes both mental and physical. The amount of such compensation must be determined by you, as neither the law nor any person can fix an exact basis for compensation for pain and suffering. Such a matter is left to the good judgment of the jury, who must act as reasonable men, without any favor or prejudice.

While it is hardly necessary for me to mention this fact to you, yet it will do no harm to say to you that, in determining what your verdict shall be in this case, you are not to be influenced in any wise by the fact that the defendant is a corporation or railroad company, nor that the plaintiff is a working man and perhaps in needy circumstances. The law knows no distinction between rich and poor, high and low. Your duty is to render a true and correct verdict according to the law and the evidence, regardless of any one's standing, and uninfluenced either by sympathy or prejudice. If you do that your verdict is a just one; if you do not, it is an unjust one.

You may now retire and consider your verdict.

These were all the instructions asked, given and refused in the case.

143 The jury returned a verdict in favor of the plaintiff for $1600.00.

And now comes the defendant, the Choctaw, Oklahoma & Gulf Railroad Company, with its bill of exceptions, containing all the evidence, instructions and exceptions saved, and tenders the same to the court, praying that the same may be examined, approved, signed and ordered filed and made a part of the record in this cause, which is now hereby done.

Witness my hand as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, this 21st day of June, 1901.

JACOB TRIEBER,
United States District Judge.

Which petition for writ of error and allowances thereof is as follows.

144 In the U. S. Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma and Gulf Railroad Company, Defendant and Plaintiff in Error.

Petition for Writ of Error and Orders.

The Choctaw, Oklahoma and Gulf Railroad Company, defendant in the above entitled case, feeling itself aggrieved by the verdict of the jury and the judgment rendered on the 8th day of May, 1901, comes now by J. W. McLoud and E. B. Peirce, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the 8th Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and upon the filing of said security all further proceedings in this case be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the 8th Circuit, and your petitioners will ever pray.

J. W. McLOUD,
E. B. PEIRCE.
Attorneys for defendant.

Writ of error granted and upon filing of a bond in the sum of $2500.00 to be approved by me, judgment will be superseded.
(Signed) JACOB TRIEBER,
Judge.

Filed June 22nd, 1901. W. P. Feild, Clerk.

145 Which assignment of errors is as follows:

In the U. S. Circuit Court, Eastern District of Arkansas, Western Division.

Will Holloway, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma and Gulf Railroad Company, Defendant and Plaintiff in Error.

Assignment of Errors.

The plaintiff in error, the Choctaw, Oklahoma and Gulf Railroad Company, makes the following assignment of errors in the above entitled case.

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the Court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the Court.

Fourth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman, i. e., whether he could easily see them by just keeping his eyes open."

Fifth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, the Court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw-mill man or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employe has the right to rely upon that fact, without any examination made by himself, that the Company did furnish him with reason-
146 ably safe machinery, and that it had been examined by inspectors and the proper officers of the Company before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason, he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The Court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you, gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and assertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to

Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The Court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The Court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

147 Tenth. The Court erred in refusing to give instruction No. 2 asked by defendant, in words and figures as follows:

"The Court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The Court erred in refusing to give instruction No. 4 asked by defendant, in words and figures as follows:

"If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The Court erred in refusing to give instruction No. 5 asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The Court erred in refusing to give instruction No. 6 asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The Court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The Court instructs the jury that if they find from the
148 evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The Court erred in refusing to give instruction No. 8 asked by the defendant, in words and figures as follows:

"The Court instructs the jury that an employe is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The Court erred in refusing to give instruction No. 9 asked by defendant, in words and figures as follows:

"The Court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The Court erred in refusing to give instruction No. 10 asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case."

149 Eighteenth. The Court erred in giving that part of it charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employes; all that is required of it by the laws of the country is to furnish its employes working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employes it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employe with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries."

Nineteenth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"Negligence in cases of this kind consists of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employe knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The Court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not,

150 or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known

that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the Company to furnish him with
151 reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the Company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The Court erred in giving that part of its charge to the jury in words and figures as follows.

"On this issue the evidence is conflicting."

Twenty-fourth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the cir-

cumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The Court erred in giving that part of its charge to the jury in words and figures as follows:

"next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such al-
152 lowance for such time hereafter, as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The Court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

Wherefore, for the errors above assigned, the defendant and Plaintiff in Error prays that the judgment rendered in this case be reversed, set aside, and held for naught.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant and Plaintiff in Error.

Filed June 22nd, 1901. W. P. Feild, Clerk.

Which supersedeas Bond is as follows:

153 Know all men by these Presents, that we, Choctaw, Oklahoma & Gulf Railroad Company, J. T. Beal and Jas. J. Mandlebaum, are held and firmly bound until Will Holloway, in the full and just sum of Twenty-five hundred and no-100 Dollars to be paid to the said Will Holloway, heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 20th day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the April term A. D. 1901, of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in a suit depending in said Court between Will Holloway plaintiff and Choctaw, Oklahoma and Gulf Railroad Company, defendant, judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma & Gulf Railroad Company has obtained a writ of Error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Will Holloway citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

CHOCTAW, OKLAHOMA & GULF RD. CO. [Seal]
By E. B. PEIRCE, Its Atty.
J. T. BEAL, [Seal]
JAS. J. MANDLEBAUM, [Seal]

Approved by
JACOB TRIEBER, Judge

Filed June 22, 1901. W. P. FEILD, Clerk.

154 The United States of America, to Will Holloway—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein The Choctaw, Oklahoma and Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this 22nd day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,

United States District Judge, for the Eastern District of Arkansas.

Service acknowledged.
J. W. HOUSE,
Atty. for Holloway.

Indorsed: Filed June 22, 1901. W. P. Feild, Clerk.

155 United States of America, Western Division of the Eastern District of Arkansas.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing . . . .annexed to this certificate is a true, correct and compared copy of the originals remaining of record in my office, and constitute a true copy of the record, of the assignment of errors and of all proceedings in case of Will Holloway vs. Choctaw, Oklahoma and Gulf Railroad Company.

In witness whereof, I have hereunto set my hand and the seal of said Court, this Thirteenth day of July, in the year of our Lord, One Thousand Nine Hundred and one, and of the Independence of the United States of America, the One Hundred and twenty-sixth.

The Seal of the Circuit Court U. S. A. Western Division of East. Dist. Ark.

W. P. FEILD, Clerk.

Attest:

Filed Jul 25, 1901. John D. Jordan, Clerk.

(*Appearance for Plaintiff in Error.*)

And on the twenty-ninth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals, in said cause, in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter our appearance as counsel for the plaintiff in error.

J. W. McLOUD.
E. B. PEIRCE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma and Gulf Railroad Company, pl'ff in error, *vs.* Will Holloway. Appearance. Filed Jul- 29, 1901, John D. Jordan, clerk. J. W. McLoud, E. B. Peirce, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the eighteenth day of September, A. D. 1901, an appearance of counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter my appearance as counsel for the defendant in error.

J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Will Holloway. Appearance. Filed Sep. 18, 1901. John D. Jordan, clerk. J. W. House, counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the sixth day of January, A. D. 1902, an appearance of Mr. C. B. Stuart, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. B. STUART.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1625. The Choctaw, Oklahoma & Gulf Railroad Co., pl'ff in error, *vs.* Will Holloway. Appearance. Filed Jan. 6, 1902. John D. Jordan, clerk. C. B. Stuart, counsel for pl'ff in error.

(*Order of Submission.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. E. B. Peirce in behalf of the plaintiff in error; continued by Mr. J. W. House for the defendant in error and concluded by Mr. C. B. Stuart for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the thirty-first day of March, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CHOCTAW, OKLAHOMA AND Gulf Railroad Company, Plaintiff in Error, *vs.* WILL HOLLOWAY, Defendant in Error.	No. 1625. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. E. B. Peirce and Mr. C. B. Stuart (Mr. J. W. McLoud was with them on the brief) for plaintiff in error.

Mr. J. W. House (Mr. M. House was with him on the brief) for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Syllabus.

1. Negligence—Limit of duty of master is to exercise ordinary care.—It is error to instruct a jury that it is the duty of the master to provide reasonably safe appliances, tools or working places for his servants or to keep them in a reasonably safe condition of repair. The limit of the duty of the master is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools and working places and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair.
2. Error—Prejudice presumed from.—The legal presumption is that error produces prejudice. It is only when it appears beyond all doubt from the record that the error complained of did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.
3. Error without prejudice.—Where the court rightly charges the jury on the conceded facts that the master was negligent as a matter of law, an erroneous charge relative to the degree of care required of the master, appears beyond all doubt to be error without prejudice, because no question of the negligence of the master was submitted to the jury for their determination.
4. Master and servant—Duty of servant—Assumption of risk.—The servant assumes all the ordinary risks of the employment which are known to him and which would have been known

by the exercise of ordinary care to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and working place and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation.

5. Verdict—Sufficiency of evidence—Inspection.—The court may not reverse a judgment because there was no evidence to support a finding of fact by a jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects of which is in issue, because the evidence derived from the inspection is not, and cannot be presented to the appellate court for consideration.
6. Negligence—Concurrence of third party no excuse for.—One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.
7. Negligence—Failure to provide brakes for road engine is.—The failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, evidence of the want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad.
8. Proximate cause of collision—Absence of brakes on engine may be.—Collisions and accidents may be reasonably anticipated as the natural and probable consequence of the failure to provide brakes to control the movements of road engines.
9. Contributory negligence concerning, or assumption of known risks no defense to action for damages from unknown risks.—Contributory negligence regarding, or assumption by a servant of known risks will not constitute contributory negligence regarding, or the assumption of an unknown risk, nor a defense for the master whose negligence produces it. A servant knew and assumed the risks of running an engine backward, tender foremost, in the night, without any light or employé on the forward end of the tender. *Held*, that his contributory negligence and assumption of risks in this regard constituted no defense to his action against the master for negligence in failing to supply the engine with brakes, where he did not know, and a person of reasonable prudence and discretion, exercising ordinary care, would not, in his situation, have known of the absence of the brakes.

Statement.

In the early morning of October 30, 1900, while it was yet dark, a road engine of the Choctaw, Oklahoma & Gulf Railroad Company collided with a horse which was caught in a trestle as the engine was backing, tender foremost, from Brinkley to Hulbert, and in-

jured Will Holloway, the defendant in error. There was no light on the forward end of the tender and no employé there to warn of danger. There was no brake on the engine, although there was a brake upon the tender. Holloway was a fireman working on the engine. He was aware of the darkness of the night, of the absence of a light and of an employé upon the end of the tender, but he insisted that he did not know that there was no brake upon the engine. He sued the company for negligence in that it failed to supply the engine with a proper brake, alleged that the accident would not have occurred if such a brake had been provided and that through its absence he was caught between the tender and the engine when the air was applied to the brake upon the tender and seriously injured. The court instructed the jury that if there was no brake upon the engine and Holloway did not know, and would not by the exercise of reasonable diligence and prudence have known that the engine was supplied with a brake and if the absence of the brake caused the accident, the company was liable and they might return a verdict against it, but that if there was a failure of proof of either of these facts, their verdict must be for the defendant. This instruction and the refusal of the court to instruct the jury to return a verdict for the defendant are the principal errors assigned by the company, although many others are specified.

SANBORN, circuit judge, after stating the case as above, delivered the opinion of the court:

Actionable negligence is a breach of duty. Where there is no breach of duty there is no negligence and there can be no recovery. It is not the duty of the master to furnish his servants with reasonably safe appliances, machinery, tools or working places, or to keep them in a reasonably safe condition of repair, his failure to do so is not the breach of any duty and it furnishes no basis for an action of negligence. The limit of his duty here is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools and working places and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Louisville & N. R. Co. v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *id.* 22 C. C. A. 269, 76 Fed. 443.

A servant may assume that his master has discharged this duty unless he knows, or by the exercise of reasonable care he would have known that the duty had not been discharged and that there were defects in the machinery and appliances with which, or in the place in which he undertakes to work. On the other hand, the servant assumes all the ordinary risks and dangers of the employment upon which he enters so far as they are known to him and so far as they would have been known to a person of ordinary prudence

and care by the exercise of ordinary diligence. He is not required to search for latent defects or hidden dangers; but it is his duty to exercise reasonable diligence to observe, and be cognizant of all obvious defects in the machinery and appliances with which he is working and he assumes the risks and dangers of all such defects of which he has knowledge and of which he would have had knowledge by the exercise of ordinary care and diligence. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344; *Fordyce v. Edwards*, 60 Ark. 438, 442; *Anderson v. Railway Co.*, 39 Minn. 523; *Little Rock &c. Railroad Co. v. Leverett*, 48 Ark. 347; *Wormell v. Railroad Co.*, 79 Me. 405; *Way v. Railroad Co.*, 40 Ia. 341; *Batterson v. Railway*, 53 Mich. 125; *Illick v. Railway Co.*, 67 Mich. 632; *Morton v. Railroad Co.*, 81 Mich. 435.

The plaintiff in this case alleged that his injury was caused by the failure of the railroad company to provide the engine upon which he was working as fireman with suitable brakes to arrest its motion when occasion required. The court charged the jury that if there was no brake upon the engine, if the absence of the brake caused the injury and if the plaintiff was not aware of the fact that the engine was not provided with a brake and if a person of ordinary prudence exercising reasonable care would not under the circumstances of this case have been aware of this fact, they might render a verdict against the company. It is contended that this charge was erroneous, (1) because there was no substantial evidence to warrant the finding of the jury that the plaintiff did not know, or by the exercise of ordinary care would not have known of the absence of the brake, (2) because there was no substantial evidence to warrant their finding that the injury could have been avoided by the presence of the brake upon the engine and (3) because there was no substantial evidence to warrant the finding that the absence of the brake was the proximate cause of the injury. A careful and painstaking examination of the testimony has satisfied us, however, that this position cannot be sustained. The plaintiff testifies that he was not aware that the engine was not furnished with a brake. Another witness who was employed about the engine as a brakeman for some time demonstrates by his testimony that he did not know whether there was a brake on the engine or not; and the jury made an ocular inspection of an engine of the same character as that upon which the accident occurred for the express purpose of determining this question and they found this issue in favor of the plaintiff. The knowledge upon this question which an inspection of the engine conveyed to the minds of the jurors is not and cannot be presented to this court by the record and we cannot undertake to say that all reasonable men with the testimony and the knowledge which this jury lawfully acquired would necessarily come to a conclusion contrary to that which these jurors have reached. *McReynolds v. Burlington &c. R'y Co.*, 14 Am. & Eng. Railroad Cases 172, 174; *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 323.

Upon the question whether or not the engine could have been stopped after knowledge of the presence of the horse in the trestle in time to prevent the accident, the testimony was not so clear that it

was the duty of the court to withdraw this issue from the jury. Nor can it be properly said as a matter of law that the absence of this brake was not the proximate cause of the injury. It is undoubtedly true that one of the proximate causes of the accident was the negligence of the party who permitted the horse to stray into the trestle. But if the injury would not have been inflicted if there had been a brake upon the engine, it cannot be truthfully said that the absence of this brake was not another of the proximate causes of the damage, inasmuch as the accident would not have happened if the brake had been provided. If it be true, as the jury have found, that no injury would have been inflicted upon the plaintiff if this engine had been provided with a brake, it is no defense for the railroad company that the concurring negligence of the owner of the horse contributed to the infliction of the injury. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence. It is no defense for a wrong-doer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. *Union Pac. R'y Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. 988, 6 C. C. A. 205; *Chicago, R. I. & P. R'y Co. v. Sutton*, 27 U. S. App. 310, 312, 63 Fed. 394, 395, 11 C. C. A. 251, 252–'3; *Railway Co. v. Chambers*, 68 Fed. 148, 153, 15 C. C. A. 327, 332; *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 824, 16 C. C. A. 457, 458; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 702; *Harriman v. Railway Co.*, 45 Oh. St. 11, 32; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145; *Cayzer v. Taylor*, 10 Gray 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38; *Cone v. Railroad Co.*, 81 N. Y. 206.

Nor does the absence of brakes from this engine fall without the legal definition of the proximate cause of the injury which the plaintiff suffered. An injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen nor reasonably anticipated as the probable result of such an act cannot be made the basis of an action for damages. The purpose of brakes upon engines and cars is to quickly arrest their speedy motion and to prevent collisions and accidents. The natural and probable consequences of their absence from machines as powerful and as rapid in their movements as locomotive engines are the collisions and accidents which it is the purpose of their use to avoid. From the failure to provide this engine with proper brakes to arrest its motion the accident and injury which resulted or others of like character might well have been anticipated as probable consequences, and the evidence in the record is ample to sustain the finding of the jury that the injury to the plaintiff was caused by that absence. The very fact that it is the common, the almost universal practice to provide locomotive engines with brakes for the purpose of controlling their movements and preventing accidents and collisions is very persuasive, if not conclusive evidence that such disasters may be reasonably anticipated as, and are the probable consequences of their ab-

sence. *Chicago, St. P., M. & O. R'y Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347; *Railway Co. v. Kellogg*, 94 U. S. 469, 475.

It is assigned as error that the court instructed the jury that the failure of the company to provide this engine with brakes was actionable negligence for which the defendant was liable. But this specification is untenable. Actionable negligence in this case was the failure of the railroad company to exercise reasonable care to provide a reasonably safe engine for operation upon this railroad. The plaintiff testified that he had never worked upon an engine before which was not provided with a brake, although he had been in the employment of railroad companies for some years. The knowledge that it is the usual practice to provide road engines with brakes to control and arrest their motion is so common and general that courts cannot assume to be ignorant of it. Courts take judicial notice of business customs and practices which form a part of the common knowledge of the people of the country. *Brown v. Piper*, 91 U. S. 37, 42, 1 Greenleaf's Evidence, 11. There may be, and probably are circumstances under which the absence of a brake from an operating engine would not constitute a want of reasonable care to provide a reasonably safe locomotive for the purpose to which its use is applied. This might be true of an engine employed in a yard for switching purposes. It might be true under many circumstances which could be shown by evidence. But in the case at bar the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines. This, then, was the case presented to the court below: Railroad companies ordinarily provide their road engines with brakes. The exercise of ordinary and reasonable care induces carriers to equip their road engines in this way. The purpose of the exercise of this care is to prevent accidents and collisions. Such accidents and collisions are the natural and probable consequences of a failure to exercise this care. The conclusion was inevitable that the failure to provide this road engine with brakes, in the absence of any evidence excusing it, was a failure to exercise ordinary care to provide a reasonably safe engine for operation upon this railroad. And the charge of the court that the defendant was liable for any injury which resulted from the failure to provide the brakes is sustained by the evidence, the law and the reason of the case.

It is assigned as error that the court refused to instruct the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, that the greater the risk which attends the work to be done and the machinery to be used the more imperative is the obligation resting upon him and that if the plaintiff could by using ordinary care and diligence have informed himself of the condition of the engine as to brakes and if he failed to do so and an ordinarily prudent man under like circumstances would have done so, his failure to take such precautions was

negligence and would bar his recovery in the case. The rules which measured the respective liabilities of the plaintiff and the defendant in this case have been stated at the opening of this opinion. So far as this requested instruction conforms to those rules it was given in the general charge of the court and so far as it does not conform to them, it was erroneous and should not have been given. The court charged the jury that if the engine was without brakes and this fact was unknown to the plaintiff "and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case as shown by the evidence," the company might be liable, and when the entire charge is carefully read nothing inconsistent with this declaration can be found in it. There was no error in the refusal of the court to give the requests under consideration in view of the general charge which presented to the jury all the sound propositions of law stated therein.

Another specification of error is that the court refused to instruct the jury that if the plaintiff was guilty of negligence in riding on an engine backing with the tender foremost in the dark, without a light upon the forward end of the tender he could not recover. But there was no error in this refusal. The plaintiff could not recover for the negligence of the company in running this engine backward in the night without a light upon the forward end of the tender because the plaintiff was aware of this negligence and assumed the risk of it. But he did not know that the engine upon which he was riding was not provided with brakes. The exercise of ordinary care by the defendant would have equipped it with these appliances. He had the right to assume that the defendant had exercised this care. He did undoubtedly indulge in that assumption. The jury have found that the absence of the brakes was not an obvious defect, not a defect which a person of ordinary prudence exercising reasonable care would have discovered under the circumstances of this case. As he was ignorant of the absence of the brakes, he did not assume the risk of that absence and his assumption of the risk of riding upon an engine and tender in the night with a head-light upon its forward end was not an assumption of the risk of operating this engine without brakes. His negligence regarding, or his assumption of the former risks was neither such contributory negligence regarding, nor such an assumption of the latter risk as bars him from a recovery for the negligence of the defendant producing it. A servant may not assume a risk or be guilty of contributory negligence in exposing himself to a risk of which he is ignorant and of which an ordinarily prudent person would not have been aware by the exercise of ordinary care and diligence. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 948–'9, 5 C. C. A. 341, 346; *O'Neill v. Chicago, R. I. & P. R'y Co.*, 86 N. W. 1098; *Railway Co. v. Keegan*, 87 Fed. 849, 852, 31 C. C. A. 255, 258.

Counsel for the defendant also complain that when the jury were sent to inspect the engine the court instructed them to "go inside and try to put themselves only in the same place that the fireman would naturally occupy and then occupying that place to determine whether the wheels of the engine on which the brakes would be

could be seen from there, without looking for them, while a man was employed for several hours doing work on the engine as a fireman, that is to say, whether he could easily see them by just keeping his eyes open." If this excerpt from the instructions of the court had been all that was said to the jury on this subject, it might have been erroneous. But it was followed with the direction that "a man cannot shut his eyes and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open" and that "if the fact that there were not any brake-shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours without hunting for it, then the court will tell you that he had knowledge of, and ought to have known of it and he is chargeable with it as if he had known it" and that "if in getting off and on and working and firing for six hours as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it who was a fireman by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion." Excerpts from a charge cannot be wrested from their connection and relation and fairly criticized. The entire charge upon a given subject must be taken together and if when so read it conforms to the law, no just objection to it can be urged. When the instruction of the court upon the duty of the jury in inspecting this engine is so read, it will be found to be in accordance with the established rules of law which control this case and which are stated in the opening of this opinion. There was no error in the instruction of the court upon this subject.

It is assigned as error that the court repeatedly instructed the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place. This instruction was a patent and unquestionable error. It has been so declared by this court repeatedly from *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68, decided in 1892, through *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980, *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48, *St. Louis, I. M. & S. R'y Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459, to and including *Lesser Cotton Co. v. St. Louis, I. M. & S. R'y Co.*, — Fed. —, decided in 1902. The limit of the duty of the master to the servant in the matter of place of service, of machinery and of appliances is to exercise ordinary care to furnish him with a reasonably safe place and reasonably safe appliances and to use ordinary care to keep the place and the appliances in a reasonably safe condition.

Moreover, the presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal, is applicable. *National Masonic Acc. Ass'n v. Shryock*,

20 C. C. A. 3, 11, 73 Fed. 774, 781; *Atchison, T. & S. F. R'y Co. v. McClurg*, 8 C. C. A. 322, 325–'6, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807–'8; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Moores v. Bank*, 104 U. S. 625, 630; *Gilmer v. Higley*, 110 U. S. 47, 50; *Vicksburg & Meridian Railroad v. O'Brien*, 119 U. S. 99, 103; *Mexia v. Oliver*, 148 U. S. 664, 673; *Boston & Albany Railroad Co. v. O'Reilly*, 158 U. S. 334, 337; *Peck v. Heurick*, 167 U. S. 624, 629. But in the case at bar the record makes it clear beyond all doubt that this error did not prejudice and could not have prejudiced the railroad company, because no question concerning its duty or its negligence was left to the jury to consider by the charge of the court. The railroad company conceded that there were no brakes upon the engine. The absence of brakes upon this road engine, in the absence of any evidence excusing it, was conclusive evidence, as a matter of law, of the lack of ordinary care to provide reasonably safe machinery to operate this railroad. The court clearly and positively instructed the jury to this effect. It instructed them that the railroad company was liable for any injury that was caused by the failure to supply this engine with brakes, unless the plaintiff knew and assumed the risk of their absence. This left the jury nothing to consider relative to the care or the negligence of the company and limited the issues they were to determine to the questions whether or not the absence of the brakes was the proximate cause of the injury and whether or not the plaintiff knew, or ought to have known, and hence assumed the risk of this absence. As there was no question of the care or negligence of the company submitted to the jury, it conclusively appears beyond all doubt that the erroneous charge upon that subject could not have prejudiced the defendant, and error without prejudice is no ground for reversal.

There are other specifications of error which have not been recited in detail. They have all been carefully considered. So far as they present any debatable question, they have been disposed of by the rules and principles to which we have adverted and the discussion in which we have already indulged. Suffice it to say that a patient and painstaking review of all the evidence, of the charge of the court and of all the assignments of error has led us to the conclusion that this case was fairly and impartially tried and that the rulings and charge of the court were free from prejudicial error. The judgment below must therefore be *affirmed* and it is so ordered.

THAYER, *Circuit Judge:*

I concur in the order affirming the judgment below for the reason stated in the foregoing opinion but I would not be understood as concurring in the broad statement, which the opinion contains, that a servant "assumes the risks and dangers of all * * * defects" (in machinery and appliances) "of which he has knowledge and of which he would have had knowledge by the exercise of ordinary care and diligence." Nor do I think that such a broad statement of the law is necessary to a correct decision of the case. It is well settled that a servant who uses machinery, tools or appliances

known to be defective but, in pursuance of a promise by the master that they will be repaired, does not assume the risk of injury but may recover if hurt, excepting where the risk of injury is so imminent that a prudent person would not have used them at all. And I conceive that there may be other exceptions to the rule. *Hough v. Railway Co.*, 100 U. S. 213, 225 and case cited; *Homestake Mining Co. v. Fullerton*, 16 C. C. A. 545, 549, 69 Fed. Rep. 923. See also *Southern Pacific Co. v. Yeargin*, — C. C. A. —, 109 Fed. Rep. 436, 441.

Judge Caldwell joins in the views expressed in this concurrence.

Filed March 31, 1902.

(*Judgment.*)

And on the thirty-first day of March, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

MONDAY, *March* 31, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY. } No. 1625.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Will Holloway have and recover against the Choctaw, Oklahoma and Gulf Railroad Company, the sum of twenty dollars for his costs herein and have execution therefor.

March 31, 1902.

(*Petition for Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Petition for writ of error.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner respectfully shows that it is a corporation organized under an act of the Congress of the United States, entitled, "An act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that company," which was approved August 24th, 1894, and the acts supplemental thereto, approved on April 24th, 1896, entitled, "An act to amend an act approved August 24th, 1894, entitled, 'An act to authorize the purchasers,'" etc., and the act approved March 28th, 1900, entitled, "An act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company;" that by the judgment heretofore rendered by the said United States circuit court of appeals for the eighth circuit, in the above-entitled cause, manifest error has happened, to the great damage of your petitioner, in this: That a great and manifest error at law occurred at the trial of the said cause against the objection of your petitioner, and to its great damage, all of which will more fully appear by the record of said court in said cause.

Your petitioner further shows that this is not a case in which the jurisdiction is dependent upon the opposite parties to the suit or controversy being aliens *or* citizens of the United States, or citizens of different States, nor a case arising under the patent laws, or under the revenue laws, or under the criminal laws, nor an admiralty case; and that the matter in controversy exceeds one thousand dollars besides costs.

Wherefore, your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States to be directed to the said United States circuit court of appeals for the 8th circuit, whereby, under the seal of said United States circuit court of appeals for the 8th circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with the writ of error, and that the record and proceedings aforesaid being inspected, the Supreme Court of the United States will cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Rail road Company, plaintiff in error, *vs.* Will Holloway. Petition for writ of error. Filed May 26, 1902, John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-sixth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Assignment of errors.

Now comes the above-named plaintiff in error, The Choctaw, Oklahoma and Gulf Railroad Company, by J. W. McLoud, C. B. Stuart and E. B. Peirce, its attorneys, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the eighth circuit, there is manifest error in this, to wit:

First. That by the record aforesaid, it appears that the judgment aforesaid given, was given for the said Will Holloway against the said Choctaw, Oklahoma and Gulf Railroad Company, whereas, by the law of the land, the said judgment ought to have been given for the said Choctaw, Oklahoma and Gulf Railroad Company.

Second. The plaintiff in error assigns separately as errors the several errors set out in the assignment of error forming part of the record in the above-entitled action before the said circuit court of appeals, and alleges that the said circuit court of appeals erred in not holding that the said circuit court of the United States for the western division of the eastern district of Arkansas erred in each of said assignments of error, to wit:—

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the court.

Fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman, *i. e.*, whether he could easily see them by just keeping his eyes open."

Fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, the court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad, or whether it is a saw-mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employé has the right to rely upon that fact, without any examination made by himself, that the company did furnish him with reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the company, before it was turned over to them, except where it is defective, and his attention has been called to the defect, and for that reason, he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The court instructs the jury, that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

Tenth. The court erred in refusing to give instruction No. 2 asked by defendant, in words and figures as follows:

"The court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The court erred in refusing to give instruction No. 4 asked by defendant, in words and figures as follows:

"If the jury believe from the evidence, that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The court erred in refusing to give instruction No. 5 asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cow-catcher, was a dangerous method of riding, so far as obstructions on the track or road-bed were concerned, and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The court erred in refusing to give instruction No. 6 asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The court erred in refusing to give instruction No. 8, asked by the defendant, in words and figures as follows:

"The court instructs the jury that an employé is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The court erred in refusing to give instruction No. 9, asked by defendant, in words and figures as follows:

"The court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The court erred in refusing to give instruction No. 10, asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have in-

formed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair and was to go to the workshop to be overhauled, and all other facts and circumstances surrounding the case."

Eighteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the country is to furnish its employees working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employés, it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employé with tools reasonably safe and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries."

Nineteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Negligence in cases of this kind consists of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employé knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all that you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brake-shoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years' experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backwards, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence

as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of 58 to 60 miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The court erred in giving that part of its charge to the jury in words and figures as follows:

"On this issue the evidence is conflicting."

Twenty-fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be, first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter, as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

Third. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the western division of the eastern district of Arkansas to said circuit court of appeals, erred in making its order affirming the judgment of said circuit court of the United States, and directing a mandate to issue to the circuit court of the United States for the western division of the eastern district of Arkansas, directing the said circuit court of the United States to proceed in accordance with the decision and order of said circuit court of appeals.

Fourth. That the said circuit court of appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said circuit court of the United States and in not directing a new trial of the issues raised by the pleadings in said action; and the said Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court of appeals and in the circuit court of the United States for the western division of the eastern district of Arkansas, and the order entered herein as aforesaid by the circuit court of appeals, and the judgment of affirmance to be entered in the said circuit court of the United States for the western division of the eastern district of Arkansas upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment and order.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Assignment of errors. Filed May 26, 1902. John D. Jordan, clerk.

(*Supersedeas Bond on Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a supersedas bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
WILL HOLLOWAY, Defendant in Error.

Know all men by these presents:—that we, Choctaw, Oklahoma and Gulf Railroad Company, as principal, and Allen N. Johnson and Chas. F. Penzel, as sureties, are held and firmly bound unto the defendant in error, Will Holloway, in the full and just sum of three thousand ($3000.00) dollars, to be paid to the said defendant in error, Will Holloway, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the — day of May, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of appeals of the United States for the eighth circuit, in a suit depending in said court, between Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, and Will Holloway, defendant in error, a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma and Gulf Railroad Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Will Holloway, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof,

Now, the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY,
By J. W. McLOUD, *General Solicitor.* [SEAL.]
ALLEN N. JOHNSON. [SEAL.]
CHAS. F. PENZEL. [SEAL.]

Sealed and delivered in presence of—
E. B. PEIRCE.

Approved by:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.
May 23rd, 1902.

This bond is good and acceptable to defendant in error.

J. W. HOUSE,
Att'ys for Def't in Error.

(Endorsed:) No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Bond. Filed May 26, 1902, John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, and Will Holloway, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Writ of error. Filed May 26 1902 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } *ss.*:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this thirty-first day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the twenty-eighth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the acceptance of service endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss.*:

To Will Holloway, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of the within citation this the 27th day of May, 1902.

J. W. HOUSE,
Counsel for Defendant in Error.

[Endorsed:] No. 1625. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Citation. Filed May 28 1902 John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred forty-one pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Will Holloway was defendant in error, No. 1625, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

I do further certify that a copy of the writ of error is lodged in my office for the use of the defendant in error.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this thirty-first day of May, A. D. 1902.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18580. U. S. C. C. of appeals, 8th circuit. Term No. 352. The Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, *vs.* Will Holloway. Filed June 10, 1902.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 23 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. .. ..*Plaintiff in Error.*

v. No. ~~359~~ 68

WILL HOLLOWAY.. .. ..*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

EDWARD B. PEIRCE,
Attorney for Plaintiff in Error.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. 352**

WILL HOLLOWAY.. .. ..*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

This case was originally instituted in the Circuit Court of Lonoke County, Arkansas, and removed by the plaintiff in error to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, on the ground of the Federal character of the defendant corporation (Tr., pp. 5, 6, 7).

The original complaint (Tr., p. 3) filed by the defendant in error was as follows:

"On this day comes the plaintiff, W. H. Holloway, and for cause of complaint herein, states that on the 30th day of October, 1900, he was employed by the defendant company

as a fireman, and was then engaged in his duties as such fireman; that on the night of said day he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Ark., and while there the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher of defendant company at Little Rock, Ark., at about 11 o'clock at night, directing them to back up the switch engine No. 3 from Brinkley east to Hulbert, a distance of about fifty-eight miles; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so that the headlight would be in front and they would thereby be enabled to run the same with greater safety, but his request was refused and they were directed by said chief night dispatcher at Little Rock, Ark., to back said switch engine down to Hulbert, a distance of about fifty-eight miles, in the nighttime as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis, as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. with said switch engine No. 3, backing the same east in the direction of Hulbert; and in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about thirteen miles east of Brinkley, where they ran upon and collided with a horse on said trestle, without fault on their part, and said switch engine was thereby suddenly derailed and the plaintiff was caught between the tank and the engine and was thereby seriously and permanently injured as follows, to-wit:

"Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he suffered continuous and excruciating pain both in body and mind ever since, and he continues so to suffer; that said broken ribs, bruised and lacerated kidneys and other bruises and lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company; that said negligence of the defendant company consists in this, to-wit:

"1. In directing the said Davis and this plaintiff to run said switch engine backwards in the nighttime when it was dark.

"2. In not providing for and having a headlight on the back end of said engine.

"3. In not placing a man on the footboard in front of said engine, with a white and red light, as required by the rules of said defendant company, and as required by law.

"4. In not providing for and furnishing said engine with a pilot or cowcatcher.

"5. That said engine was a regular road engine except it had footboards at each end for a man to stand on with lights. It was a square or box engine and did not slope forward and downward so as to give a better view in front of the engine.

"6. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman; and it negligently failed to do so in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence as above stated the plaintiff has suffered the injuries above mentioned and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of $10,000. He further states that the defendant company is a railway corporation organized under the laws of the State of Arkansas and is and was on said date running and operating a railroad in this State through Pulaski, Lonoke and other counties. He further states that by reason of said injuries, caused by the neglect of the defendant as above stated, he has been forced to make a drug and medical bill in the sum of $75; wherefore he prays judgment for the sum of $10,075. and for such other and further relief as he may be entitled to."

On the 29th day of March, 1901, and after the cause had been removed to the United States Circuit Court, the plaintiff in error filed its demurrer to the foregoing complaint on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant (Tr., p. 9).

On the 6th of April following the defendant in error filed an amended and substituted complaint (Tr., pp. 10, 11, 12) as follows:

"On this day comes the plaintiff, Will Holloway, and for amended and substituted complaint herein states that the defendant is a corporation and operates a railroad in this

State, and that on the 27th day of October, 1900, he was employed by the defendant company as a fireman; that on the 29th day of October, 1900, he entered upon his duties as such fireman, and began work for the defendant as such, and that on the 31st day of October, 1900, he was engaged in his duties as such fireman, and that, on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Ark., and while there the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher or train master of the defendant company at Little Rock, Ark., who has exclusive control of the movement of all trains and engines, at about 11 o'clock at night, directing them to back up the switch engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about sixty miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of men were at work repairing the roadbed, was ditched and disabled; that upon receiving said orders they immediately requested that they be permitted to reverse or turn the said switch engine so the headlight would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but his request was refused, and they were directed by said chief night dispatcher or train master at Little Rock to back said engine down to Hulbert, a distance of about sixty miles, in the nighttime as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about thirteen miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the tank or tender and the engine and was thereby seriously and permanently injured, as follows, to-wit: Two or more ribs were broken, his kidneys were bruised and lacerated and there were internal bruises, lacerations and injuries from which he has suffered continuous and excruciating pain both in mind and body ever since, and he continues so to suffer; that the said broken ribs, bruised and lacerated kidneys and other bruises,

lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company; that by reason of said injuries he has become permanently disabled, and at that time he was 33 years old, and was earning about $80 per month; that the said negligence of the defendant company consists in this, to-wit:

"1. In directing the said Davis and this plaintiff to run said switch engine, consisting of an engine and tank or tender, backwards in the nighttime when it was dark.

"2. In not providing for and having a headlight on the back of said engine.

"3. In not placing a man on the footboard in front of said engine with a white and red light, as required by the rules of said defendant company, as required by law.

"4. In not providing for and furnishing said engine with a pilot or cowcatcher.

"5. That said engine was a regular road engine except it had footboards at each end for a man to stand on with lights. It was a square or box engine, that is, the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

"6. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say, when the air was applied to the brakes, those on the tank or tender in front of engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine; in fact, there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied air to the brakes so as to stop the engine and tank or tender as soon as possible; the brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender in front or east of the engine, and it had no effect whatever on the engine, thus the engine was forced with all its weight and momentum upon and against the tank or tender thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the

engine and tank or tender closer together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender he was caught between the same and thereby injured as aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes.

"7. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances, with which to do his work as such fireman, and with a reasonably safe place to perform such work, and it had failed so to do in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence above stated, the plaintiff has suffered the injuries above mentioned, and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of $10,000.

"He further states that by reason of said injuries caused by the neglect of the defendant as above stated that he has been forced to make a medical and doctor's bill in the sum of about $150.

"Wherefore, he prays judgment for the sum of $10,000 on account of said injuries, and the sum of $150 for his medical and doctor's bill, and for such other and further relief as he may be entitled to."

The answer (Tr., pp. 13, 14) specifically denied each of the material allegations of the complaint and set up as a further defense that the plaintiff was guilty of contributory negligence, and that his injury was occasioned by his own carelessness and negligence and without any fault on the part of the defendant, and that the injury received by plaintiff was the result of a risk assumed by said plaintiff, and for which defendant was in no respect liable to plaintiff.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following errors for the reversal of this case (Tr., pp. 105-111):

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the court.

Fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed several hours doing work on the engine as a fireman, *i. e.*, whether he could easily see them by just keeping his eyes open."

Fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now the court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad or whether it is a saw-mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employee has the right to rely upon that fact, without any examination made by himself, that the company did furnish him reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the company before it was turned over to them, except where it is

defective, and his attention has been called to the defect, and for that reason he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks, and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

Tenth. The court erred in refusing to give instruction No. 2, asked by defendant, in words and figures as follows:

"The court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The court erred in refusing to give instruction No. 4, asked by defendant, in words and figures as follows:

"If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The court erred in refusing to give instruction No. 5, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cowcatcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that, too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether the plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The court erred in refusing to give instruction No. 6, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that, too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The court erred in refusing to give instruction No. 8, asked by the defendant, in words and figures as follows:

"The court instructs the jury that an employee is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The court erred in refusing to give instruction No. 9, asked by defendant, in words and figures as follows:

"The court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The court erred in refusing to give instruction No. 10, asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair, and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case."

Eighteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the

country is to furnish its employees working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employees it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employee with tools reasonably safe, and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.

Nineteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

" Negligence in cases of this kind consist of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employee knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on

which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of fifty-eight to sixty miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or

sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The court erred in giving that part of its charge to the jury in words and figures as follows:

"On this issue the evidence is conflicting."

Twenty-fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

In the Circuit Court of Appeals it was assigned as error that the court erred in not sustaining each of the foregoing assignments of error, and in addition erred (1) in making the order affirming the judgment, and (2) in not sustaining the writ of error and not reversing the judgment of the circuit court (Tr., pp. 128, 133).

STATEMENT OF THE FACTS.

The defendant in error was employed by the plaintiff in error as a locomotive fireman. He was an experienced fireman, and in addition had worked in the locomotive, mechanical, truck and tank departments of railroads, and had also been a brakeman. On the morning of the 29th of October, 1900, he was called at 1 o'clock to leave at 2 o'clock as fireman on C., O. & G. Engine No. 33. The engine did not go out at 2 o'clock, but left at about 3 or 3:30 o'clock in the morning and arrived at Brinkley between 11 and 12 o'clock. There he remained until the next morning about 5 o'clock, when he left on his engine and arrived at Hulbert about noon on the 30th. Upon the arrival of the engine at Hulbert he and his engineer were immediately transferred to W. & B. Engine No. 3 (being the engine upon which the accident complained of, later occurred), with directions to bring said engine to Little Rock for a general overhauling. This engine left Hulbert about 1 o'clock in the afternoon and arrived at Brinkley about 7:20 that evening. In the meantime, the engine used in the pit at Hulbert gave out and it was decided to have this engine, No. 3, return from Brinkley to Hulbert to take the place of the disabled engine at Hulbert. The engine started on its return trip from Brinkley to Hulbert at about 11 o'clock at night, backing up, that is, with the tender forward, without any light on the tender, upon a dark, misty night, and after it had gone about twelve or thirteen miles it collided with a horse on a trestle, the tender of the engine was derailed, and Holloway claims to have received the injuries complained of in this action. He sued for $10,150, and upon trial the jury rendered a verdict in his favor for $1,600.

BRIEF.

I.

The ninth assignment of error is based upon the refusal of the court at the conclusion of the testimony to direct a verdict in favor of the defendant. In the discussion which we propose to make upon the action of the court in that respect, we might also properly include the first, second, third, tenth and twenty-seventh assignments of error.

It will be observed that there was an original and an amended complaint filed in this action. To the original complaint a demurrer was interposed, which was practically conceded by the defendant in error by the filing of an amended complaint, which amended complaint undertakes to make new charges of negligence, and embraced the only charge upon which the case was finally submitted to the jury by the court.

The charge of negligence submitted to the jury was stated in the complaint as follows:

"Sixth. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say, when the air was applied to the brakes, those on the tank or tender in front of the engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine; in fact, there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied air to the brakes so as to stop the engine and tank or tender as soon as possible; the brakes were successfully applied to the wheels of the tank or tender, but

the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine, thus the engine was forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender close together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender, he was caught between the same and thereby injured as aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes."

It will be observed that the allegation of the complaint in respect to these brakes is a little peculiar. It states "that the shoes could not be made to clasp the wheels," and then states "in fact, there were no shoes on the brakes of the engine."

The answer denies the allegations as to the defective brakes, and alleges the fact to be that there were no brakes at all on the engine.

The court submitted the question to the jury in the following language:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleged injuries were sustained, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without any headlight or other

light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person under all the circumstances should have known the fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man of the experience of plaintiff as a railroad man, or even a man of much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of fifty-eight or sixty miles. * * * Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident would not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

"The plaintiff testified that, while he did not see the horse that caused the accident, the engineer called to him, 'Lookout, lookout;' that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes caused the accident whereby plaintiff was injured. On the other hand, the engineer testified that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the locomotive was running backward; that there was no light in front; that the engineer

kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact whether even if there had been brakes, the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

Now, it occurs to us that the court submitted the case upon a theory not contemplated by, and wholly inconsistent with, the complaint. The complaint in the beginning stated that they ran upon and collided with a horse upon said trestle *without fault upon the part of either the fireman or the engineer*, and does not charge any negligence as to the presence of the horse on the track, and in fact, the court instructed the jury that the presence of the horse on the track could not be imputed to the railroad company as negligence. The complaint did not charge that if the engine had been supplied with brakes that the collision with the horse could have been avoided, but, in fact, states that the collision with the horse was without fault of either the engineer or the fireman, but states that when the brakes were successfully applied to the tender and the tender stopped, that the engine, being without brakes, was forced upon the tender with such momentum that the ends of the tank or tender and the engine were brought close together and he was caught while trying to get out. Now, we do not think that there is

any question of negligence stated, either in the complaint or contained in the proposition as submitted by the court to the jury. *It is nowhere charged that it was negligence on the part of the railroad company to operate an engine on its road without brakes upon the engine as well as upon the tank. Nor is there any evidence to that effect.* Furthermore if there had been a charge that it was negligence to operate an engine with brakes on the tank or tender and no brakes upon the engine, and there had been any evidence to sustain the allegation, still it cannot be imputed to the railroad company as negligence, because there was no charge or evidence that such an accident could have been foreseen or reasonably anticipated as the probable result of operating an engine so equipped; not only was there a failure to charge this, but no such question was submitted to the jury for their determination, and there was absolutely no proof anywhere offered to show that an injury of this kind could have been reasonably anticipated from operating an engine in this way; this is especially important in this case, for the reason that the court found, as a matter of law, from the evidence, that there was no defect in the goose-neck or the draft castings, which the plaintiff charged were defective, and instructed the jury that they were not to consider any defect in that respect at all, and it is also especially important in this case, for we know of no rule of law or mechanics by which the actions of a railroad engine in a collision can be foreseen.

Ry. *v.* Elliot, 55 Fed. Rep., 949.
Motey *v.* Pickle Marble & Granite Co., 74 Fed. Rep., 155.

But waiving these considerations for the time being, we will now proceed to examine the record to see if there was any reason to submit the case to the jury, either upon the theory contained in the complaint or the theory contained in the charge to the jury.

Plaintiff is chargeable with knowledge that there were no brakes on engine.

As we have already pointed out, the plaintiff says the brake shoes did not clasp the wheels of the engine and then says there were no brake shoes. The record seems to us very clear that there were no brakes on the engine at all, and not only that, but that defendant in error must have known that fact.

WILL HOLLOWAY testified (Tr., p. 39):

"Q. You say the engine had no brakes on it; when did you first find out that the engine had no brakes on it?

A. After we were into the wreck.

Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?

A. *No, sir, I have no right to inspect an engine; I am no engine inspector;* I am a locomotive fireman.

Q. When was your attention first called to the fact that the shoes were not at work on the wheels?

A. Why, after she went down there and didn't stop, after he applied is air, she rolled down, and I got off and told him none of these shoes ever clasped the wheels; he said no.

Q. Did you know at that time there were no brakes on the engine at all?

A. No, sir, I didn't know it until I read it in the answer to our complaint. That was the first I knew of it at all."

On transcript, page 37, he testified:

Q. You allege in your complaint here that the tank was equipped with brakes?

A. The tank was, yes, sir.

Q. And you allege that the brakes on the tank were in perfect condition, don't you?

A. Yes, sir.

Q. Now, do you undertake to say that you can ride on an engine from Hulbert to Brinkley and not tell whether there are any brakes on the driving wheels?

A. *Yes, sir, I didn't pay any attention to it.* I have got all I can do when I fire a locomotive to attend to my business, without looking after the engineer's.

Q. When you are firing, what do you look after?

A. I look after my coal, water and lights.

Q. You don't look at anything?

A. *I have got no business knowing any machinery at all, because I am not an engine inspector.*

(In connection with this answer, we desire to call the court's attention to the following rule (Tr., p. 92):

"200. Every person accepting a position with this company does so with the full knowledge of the dangers incident to the operating of railroads, and is required to exercise great care in the performance of his duties, to prevent accident to himself or others, and to see that the machinery or tools which he is to use are in a safe condition to perform the services required and to report defects as per rule 203.")

Q. You just close your eyes to everything else?

A. No, sir, I did not.

Q. So far as anything else, you just close your eyes?

A. *Yes, sir, so far as his work is concerned, it is nothing to me.*

On transcript, page 38, he testified:

Q. Well, I will ask you, Mr. Holloway, if there were no brakes on that engine, if that is not a perfectly apparent fact? Where are the brakes located on an engine?

A. Where it is a ten wheeler, they are located on the front.

Q. Well, we are talking about this engine, if it was a ten wheeler or twenty wheeler, or more?

A. Well, this was a ten wheeler; she has three drivers on either side. The brakes are located between the two drivers just that way, one applies to each side here, and on the other side the same way.

Q. *They can be seen perfectly when they are there?*

A. *Yes, sir, they can be seen.*

Q. *It is open to the eyes if you look?*

A. *If a man is on the ground, he can see whether they are there or not.*

Q. *If he is walking up to the engine to get on it, and he looks, he can see?*

A. *Yes, sir.*

Q. *Perfectly plain?*

A. *Yes, sir.*

Q. So you state now that if the air is applied to the tank, that it wouldn't make the engine sort of jump forward?

A. The weight of the engine is so much greater than that of the tank that it would drag it along perfectly still.

Q. When did you say you first made this discovery about the brakes?

A. There at the wreck, where we had the smash-up.

Q. Didn't you allege a defect in the brakes?

A. Yes, sir, I said there was a defect in them, *I suppose so.*

Q. Where did you tell Mr. House just now that you made that discovery?

A. Right there at the wreck.

Q. Did you examine it then to see?

A. Yes, sir, I examined to see what was the matter with the whole outfit.

Q. Now, Mr. Holloway, if there were no brakes on that engine, why would you allege in your amended complaint that the shoes didn't work?

A. Because they didn't work, or were not working at that time.

Q. There wasn't any brakes on there at all?

A. Yes, sir, the brakes were on there.

Q. The brakes were on there?

A. Yes, sir, and hung very low, didn't clear the rail more than an inch and a half after we pulled her back on the track.

Q. Then, why do you allege in your complaint that there wasn't any brakes?

A. There was no air connection.

Q. *You allege in your complaint in the first place that the brakes were defective?*

A. *Supposed to be.*

Q. Then, there was an answer filed, in which it was stated that there were no brakes at all on the engine, and then you come back in your complaint and stated that the shoes were defective, if there were any brakes there at all?

Q. *You say the shoes were on there?*

A. *I don't remember about the shoes.* The brakes were on there.

Q. You are certain of that?

A. Yes, sir, I am certain of that.

Court: Q. Can the brakes do anything without shoes on to catch the wheel?

A. If it is up tight enough, yes, sir. Of course, the shoe binds and locks.

Q. The brakes cannot do anything without shoes?

A. They are not successful, no, sir, but I say you can tighten them up until the brakes will catch.

Q. If there are no shoes on there, it cannot catch?

A. Yes, sir, the brake will catch without a shoe.

Q. But it won't do any good?

A. It will have a tendency to hold as much as it will, but not as much as a shoe, because a shoe is a great deal longer. A shoe is about that length."

On page 41 of the transcript is found the personal injury report made out and signed by Holloway after the accident, to which we invite the court's especial attention.

It will be noted that the thirteenth question asked if there was any defect in track, bridges, buildings, rolling stock, machinery, tools, or other appliances that caused, or may have assisted in causing the injury? And if so, state fully? To that question defendant in error made no answer, which may be taken as affirmatively stating that there were no defects, especially in view of his answer to question fifteen, which was: "In your opinion what further precaution could have been taken by the person injured, or by anyone in any way?" to which he answered: "The company should have had a headlight on the back end of engine, also a competent man to look out for danger." Also to question nineteen, which was: "What does injured person say was cause of accident?" to which he answered: "Horse being in trestle;" and also question twenty-one, which was: "In

your opinion was any employee at fault; if so, who and in what way?" to which he answered: "Chief dispatcher;" and also question twenty-three, which was: "Was anyone at fault; if so, who?" to which he answered: "Yes, the company for backing engine without headlight." As to whether his failure to say anything about the brakes in this report or his failure to charge it in his original complaint has any significance, we leave it to the court to say.

Transcript, page 53, he testified as follows:

"Q. Now, at the time you made this complaint, you stated here that the brakes were defective and they wouldn't work. Now, I will ask you *to what extent your attention was called to brakes that night that gave you this information?*

A. *No more than just merely passing by.*

Q. Did you notice the shoes?

A. *Why, I don't remember whether there were shoes. It seems to me there were shoes on the brakes, but it might be possible I may be mistaken about that.*

Q. Did these shoes when the air was turned on clasp the wheel?

A. Yes, sir.

Q. I mean that night?

A. No, sir; there wasn't nothing clasped these wheels at all.

Q. If the engine had been properly equipped with brakes, and the air in condition with the air turned on, would the effect of that be to clasp these shoes on the wheels?

A. Yes, sir.

Q. Now, you say the night of the injury, when the air was turned on, these shoes, if they were on there at all, didn't clasp the brakes?

A. No, sir; they didn't clasp them.

Q. You stated this morning also that you had no occasion, it was not a part of your duty as a fireman, to look after the brakes?

A. No, sir; it is in no ways connected with my affairs at all."

Transcript, page 54, he testified as follows:

"Q. Explain about these shoes, how they are made, so that these gentlemen can understand how the shoes are made to operate on the wheel?

A. The shoes are very large and very heavy; they are something like that long, and I suppose about five inches wide, and say 2½ or 3 feet long, and they are in the shape of the wheel, and there is a plunger that works from the air valve down and throws each brake to its wheel.

Q. These shoes are made in a semicircular shape, and when the air is applied the shoes are clasped right around the wheel?

A. Yes, sir; perfectly tight.

Q. How many wheels did this engine have on each side?

A. Three drivers on each side.

Q. You mean the large wheels?

A. Yes, sir; three large wheels.

Q. These small wheels, what part of the engine are these?

A. The pony trucks."

Transcript, page 55, he testified as follows:

"Q. Now, Mr. Holloway, you say that the brakes didn't clasp this night? How do you know they didn't?

A. There was nothing clasped to the wheel.

Q. How do you know they didn't?

A. I passed by the engine with my torch.

Q. Afterwards?

A. Yes, sir; and I didn't see the brakes clasped to the wheel.

Q. If there had been any on there, they would have been released then?

A. No, sir; the air stood right into the emergency, until after everything was out and over with.

Q. You don't remember whether there was any shoes on it at all or not?

A. No, sir; I do not. I am as liable to be mistaken as anybody else, but I think I am right about it."

WILL BARGER, a witness for plaintiff, testified (Tr., p. 56):

"Q. Are you acquainted with engine No. 3 W. & B.?

A. Yes, sir.

Q. Did you ever have occasion to work with it?

A. Yes, sir.

Q. Do you remember the occasion when Mr. Holloway claimed to have been injured by this engine coming in collision with a horse?

A. I don't know what date it was, but I remember the time of the trouble. I heard about it; heard the boys speak of it.

Q. Had you any knowledge of this engine before that injury occurred?

A. Yes, sir.

Q. What was the condition of the brakes of this engine?

A. She had air on her tank, but none on her drivers.

Q. How long before Mr. Holloway got hurt did you know it was in that condition?

A. I don't know just exactly how long; it was quite a little bit, though.

Q. Several weeks, you think?

A. Yes, sir.

Q. Did you work on that engine down there at Hulbert?

A. Yes, sir; we had her in the pit.

Q. Were you fireman or were you brakeman?

A. I was brakeman.

Q. You say at that time that this engine No. 3 W. & B. had no air on its brakes?

A. Had air on the tank.

Q. Had none on the engine. Do you know whether the apparatus or brakes were there, or whether there was any brakes there at all or not?

A. As far as I can remember, I don't think there was. There might have been without my seeing them. I don't think that there was any.

Q. You know there was no air that could be applied to the engine?

A. Not to the engine. There was on the tank."

On cross-examination he testified (Tr., p. 57):

"Q. Don't you know that there wasn't any brakes on the driving wheels of the engine?

A. I couldn't say positively, but I don't think there was.

Q. Aren't you pretty positive that there wasn't any brakes on there?

A. I never did see any.

Q. If there had have been, you could have seen them?

A. Yes, sir.

Q. Can you tell positively? Did that engine at that time have brakes on it?

A. Her air was not connected with the engine. It only had air brakes on the tank.

Q. But that is not the question. Did they have brakes, brake shoes, on the engine?

A. No, sir; there was not.

Q. There was no brakes on the engine?

A. No, sir.

Q. Was any of the rigging or gearing on the engine that the brakes were fastened to?

A. No, sir.

Q. I will ask you if it is possible for a man to ride on the engine from Hulbert to Brinkley over that track, with brakes on the tender and no brakes on the engine, and be ignorant of the fact that there are no brakes on the engine?

A. No, sir.

Q. Just explain to the jury why?

A. Well, if an engine has brakes on her tank and none on her drivers, in making each stop, the tank would hold to the engine, would bump up against her, because it has nothing there to hold the wheels of the engine.

Q. If a man is on an engine, and there are no brakes on the engine, but brakes on the tank, he can tell by the movement of the engine whether there are any brakes on the engine, couldn't he?

A. In stopping, yes, sir.

Q. I will ask you if a good deal of that track is not very rough, so that a man would be more likely to ascertain that fact than not?

A. It was when I was there."

On redirect examination he reiterated that there were no brakes on the driving wheels of the engine, and also that he could tell from the movement of the engine whether there were any brakes on the driving wheels.

On recross-examination and redirect examination (Tr., p. 59) he reiterated the fact that there was none of the appa-

ratus nor brakes on the driving wheels of the engine, and also that he could tell from the movement of the engine whether there were any brakes on the engine or not.

WILL HOLLOWAY, being recalled, testified (Tr., p. 61) that in coming from Hulbert to Brinkley, there was no occasion for stopping the engine in anyway for him to have noticed that there were no brakes on the engine: that the engine was light and they could shut off and stop anywhere.

E. M. ROBERTS testified (Tr., p. 64) that he was foreman of the locomotive and car department at Brinkley. That he was acquainted with White & Black Engine No. 3; that she has only tank brakes on her, that is, on both pair of trucks, what are called two pairs of trucks under her tank. There are air brakes on both pair of trucks on the tank, but there is none at all on the drivers to the engine. There never has been any since it came into his charge two years ago last February. That there were none on it on the 30th day of October, the date of the injury. That brake shoes are about twelve or fourteen inches long, about six inches wide, and about an inch and a quarter or a half thick, and the brake head is about eight inches wide, sets right up in front of the driving wheels, and then there is a brake cylinder that would sit right up under the running board of the cab, with a long lever running out here, and the lever runs down to the brake, so that when you apply the air, it shoves this lever over and applies the brake to the driving wheel. It is very bulky; a man couldn't help but see it if he was to look at it; but this engine had none on it. That he would miss a driver brake on an engine as quick as he would a wheel. It

stands out so it can be plainly and clearly seen. A fireman who had previously had several years' experience could not, he thinks, travel on an engine from Hulbert to Brinkley and from Brinkley back, thirteen or fourteen miles, without knowing whether there were any brakes on the driving wheels or not. If he did; he must have been a very careless fireman to do anything of that kind, not pay any more attention to his engine than that. He could tell by the feel of the engine, the speed of it, whether there was brakes on it or not. That this engine had three driving wheels on each side. That if there had been brakes on it, there would only have been brakes between the two back wheels on the engine, the same as an eight wheel engine. That he put the brakes on the tender the year before the Choctaw leased the White and Black River Road. That he sent and got an air pump new and everything complete, and put it on at Brinkley himself.

We call particular attention to Mr. Roberts's testimony, and ask that the court read it in full as found on pages 64, 65, 66, 67, and 68 of the record.

C. H. WELCH (Tr., p. 69) testified that he was master mechanic of the Choctaw, at Argenta. He stated that he was acquainted with the engine that Holloway was on; that there was no part of the equipment for brakes on the engine. That he did not think it was possible for a man who had had several years' experience as fireman and knows something about building tanks or tenders to ride on an engine from Hulbert to Brinkley and from Brinkley back, fifteen or twenty miles, over that track without knowing that there was brakes on the engine. That the brake is something that is in plain sight

of the fireman and engineer, and is not hidden in any way if it is there. If he looks at the engine at all, he cannot help but see it. It is just as patent as the wheel of an engine.

On cross-examination he testified as follows:

"Q. Now, you say a man could see this brake if he had looked at it; suppose the fireman was riding in the engine at the time, he couldn't see it from where he was acting as fireman, could he?

A. You can see, yes, sir; you can see part of the appliances from the cab of the engine.

Q. You can by looking for it?

A. Yes, sir.

Q. When you say it is obvious where a man goes down and looks around to see whether the brake is there, he would see it?

A. Yes, sir; it is in plain sight.

Q. The main frame of the brakes is under the engines, isn't it?

A. The shoes are right on the face of the driving wheel.

Q. But the balance of the brake is right under the engine, isn't it?

A. No, sir; the rods and the levers are, but the cylinder and fulcrum are outside the frame, if there is a driving brake of the engine.

Q. What you call the shoe comes right over the wheel?

A. Comes on the face of the driving wheel."

We invite the court's attention to the whole of Mr. Welch's testimony, found on pages 69, 70, and 71.

Y. E. WHITMORE testified (Tr., p. 80):

"Q. Mr. Whitmore, are you acquainted with the White & Black Engine No. 3 that went off that night?

A. Well, yes, sir; I looked at the engine after the accident, and I had seen her frequently before that.

Q. Do you know whether or not she had any brakes on the driving wheels?

A. No, sir; I don't believe she had. I am positive she had not.

Q. Now, Mr. Whitmore, I will ask you if a fireman with several years' experience could travel from Hulbert to Brinkley, and part of the way back, without knowing whether an engine had brakes on the driving wheels?

A. No, sir; it is hardly probable that he could; I don't think he could. In fact, the brakes on the locomotive is a very important thing, and anybody that has had five years' experience as a fireman, or in the train service at all, would know whether there was driving brakes on the engine or not, as they are in a very conspicuous place.

Q. Do you think a fireman could, with any considerable experience, or any experience, ride from Hulbert to Brinkley, and part of the way back, and not know whether there were any brakes on the driving wheels?

A. No, sir; I don't think he could.

Q. You say you saw them at Brinkley before they started?

A. Yes, sir.

Q. Were they moving the engine around there any?

A. Yes, sir.

Q. What movements did they make of it? I will just ask you this: Do you know whether Holloway was on the engine moving it or not?

A. He was on the engine, but the engineer was moving the engine.

Q. Moving around in the yard?

A. Yes, sir; moving backward and forward to get out of my way while I was doing some switching there."

On cross-examination he testified as follows:

"Q. You have stated that a fireman wouldn't probably ride on the engine that distance — now, a fireman's duty is to make the fire, isn't it, and look after the fire?

A. Yes, sir; his duty is to look after the fire, and assist the engineer with his duties as much as possible. He takes and accepts the position as a fireman always with the prospects of going further. He accepts the position as a fireman to advance his position in life, and every fireman that you see — the engineer is foreman of the engine; he is the boss, you may say, he is recognized as the head, and the fireman is subject to the engineer's orders, and no fireman could possibly be on an engine, with [illegible] years' experience, that

wouldn't know whether there was a driving brake on the engine or not, at this day and time.

Q. He could see them distinctly, could he?

A. Yes, sir; very distinctly.

Q. Suppose he was riding in the engine, could he see them then?

A. Yes, sir; you can see them if you lean your head out of the cab window six inches, you could see the brakes. More than that, they have a triple valve right underneath the fireman, attached to what is called an auxiliary reservoir, and each time the brake is applied and let off, the air escapes from this triple valve and makes a whistling noise, and in the absence of brakes, that noise is not there.

Q. The absence of brakes anywhere?

A. No, sir; there is a triple valve on both engine and tank, where there are brakes."

WILL HOLLOWAY, plaintiff, being recalled, testified (Tr., p. 85) that it was not possible to see the brakes on the engine by standing in the cab in the fireman's place and looking out in front, and explained that the reason was that there was a long running board commencing near the front end of the engine and running clear back, over and upon which the fireman's seat was situated. That since the witness, Whitmore, had testified that brakes could be seen from the cab, he had made a test on a similar engine and found it was not true.

On cross-examination (Tr., p. 88) he testified:

"Q. Can you see something of the driving wheels sitting in your seat in the cab?

A. You may see the front ones. You may see the third wheel, but I don't think you can see any more than the far edge of the rim of the middle wheel. I never tested that at all. I don't know exactly.

Q. You just sit up there and didn't look to see?

A. *I had no occasion to. I am no engine inspector or engineer. I am a locomotive fireman, and I fill that.*"

This was all the evidence introduced as to the presence or absence of brakes on the driving wheels of the engine, and the gearing and apparatus relating to same. From a reading of this evidence, no reasonable mind can reach any other conclusion than that there were no brakes on the driving wheels of the engine and no part of the appliances necessary in connection therewith. The testimony of Holloway certainly cannot be worth anything, for the reason that he states that he made an examination immediately after the accident to find out what was wrong with the "whole outfit" and he could not at the trial, to save his life, say positively whether there were any shoes on the brakes, which he claimed were there. On the contrary, the master mechanic, who had had charge of this engine for two years, and who testified that he put the brakes on the tank, said positively that there were no shoes or brakes, or any part of the appliances, on the engine. Furthermore, that it would be impossible for a man to ride on the engine without knowing this, for the reason that the appliances occupy very conspicuous places, and Whitmore testified that there was a triple valve right under the seat of the fireman which made a whistling noise whenever the brakes of the engine were applied; that there were triple valves both for the tank and the engine. Holloway rode on this engine from Brinkley to Hulbert, about sixty miles, in the daytime; was on it while it was switching in the yards at Brinkley; had the fullest opportunity for observation after supper when he was getting the engine ready to go out, and rode back for about fifteen miles, and he does not even undertake to say that during all that time he saw any of the appliances necessary for brakes on the engine.

But suppose we resolve the doubt in favor of Holloway and say that there were appliances on the engine for these brakes, no negligence can be imputed to the company. He says he cannot say positively whether there were shoes on the brakes to the driving wheels or not, and if there was he nowhere says positively that they were defective. He says that after he got out of the engine that he examined to see and the shoes did not clasp the wheels, but this does not argue anything or tend to establish negligence, for the reason that the engine had already been derailed, and as we said in the beginning of this brief, there is no law governing the action of machinery in cases of a collision or wreck, and it would be more than likely that these shoes by the shock of the collision would be thrown from their places, or it is possible might have been torn off altogether. You may take an engine in the most perfect condition and with the latest and best appliances, and if you run it into another engine, you certainly cannot expect to find all of its pieces there or in perfect shape, so that we say that this evidence shows conclusively, in the first place, that there were no brakes on this engine, and could not be defective; in the second place, that Holloway could not have been on this engine during all of this time without discovering this fact; and third, that if it is true that there were brakes on it, there is not a scintilla of evidence from the testimony which would tend to establish any negligence so far as any defect in the brakes was concerned. But we say that there were no brakes nor any of the appliances pertaining to the brakes on this engine.

It is important to remember in this connection that we are not now dealing with the case of an inexperienced youth.

The defendant in error has displayed a good deal of learning along several different lines. He testified (Tr., p. 24) that he had had quite a lot of experience as fireman on the St. Louis, Iron Mountain and Southern Railroad; that he had also been employed on the Houston and Texas Central over two years. He testified on cross-examination (Tr., p. 33) that he had worked in the locomotive, mechanical, truck, and tank departments, and had been a brakeman and a fireman, and that he was thoroughly familiar with the methods and manner of truck and tank building, and in some portions of his testimony he displayed unusual knowledge of the construction of the engine and the parts connecting the engine and the tank, how they worked, how much play they have, the distances apart, etc. He also tried to discourse on the principles of law relating to master and servant as evidenced in his cross-examination at the bottom of page 34 and top of page 35. Then, along in the middle of the page, he speaks of it being more dangerous to back up than to go ahead, but not so much so as to be *obvious*. Assuming to have some knowledge of the principles of law as applicable to master and servant, it is shown by his evidence that he had willfully and purposely disregarded the duties resting upon him in that regard, for he testified on page 37 of the transcript: "I have got no business knowing any machinery at all, because I am not an engine inspector," and reiterated this same statement in other places. Not only did he disregard the duties imposed upon him by law which entered into his contract when he was employed by this railroad company, but he also willfully violated rule 200 of the defendant company which required every person accepting

positions to see that the machinery or tools which he is to use are in safe condition to perform the services required, and to report those defects as per rule 203.

Possessing all of this knowledge and knowing well the rules of the company as he claimed to know them, and having represented himself as an experienced and competent fireman, he is certainly cut off from any claim of ignorance in any respect. The law books have a good deal to say about the duties of the master to inform inexperienced employees about hidden defects and dangers, and the hazards of using certain kinds and character of machinery, but no decision or no text-book can be found which requires the master to call the attention of experienced men to as plain a fact as it was that this engine had no brakes on the driving wheels. The very object of calling the attention of employees to certain things is based upon the idea that by reason of their youth or inexperience they would probably not observe them or would not be acquainted with the dangers connected with the operation of certain kinds of machinery. In this case, nothing of that kind exists, and how could anything be more absurd than to take up to an engine an experienced man who is thoroughly familiar with all of the parts and is in fact a builder of parts of an engine, and say to him that this engine has no brakes? It is shown that these brakes occupy a most conspicuous place, and it might as well be said that it would be the duty of the master to call the engineer's attention to the fact that a certain engine that he was expected to operate did not have any wheels. This is the height of absurdity.

The case of Fordyce vs. Edwards, 60 Ark., 41, and 65 Ark., 98, is conclusive upon this proposition.

Whether there were shoes or no shoes on the brakes or whether there were no brakes at all on the driving wheels, no negligence is shown.

There is no charge in the complaint that it was negligence to operate an engine without shoes to the brakes of the driving wheels, or to operate an engine without any brakes at all on the driving wheels of the engine. It is not shown that this is contrary to the usual practice of other railroads or violates any custom or usage of this road. The only evidence which plaintiff offers which might be construed into a stagger in that direction is found on page 53 of the transcript, where Holloway testified as follows:

"Q. Did you ever work on an engine before in your life that was not properly equipped with brakes?

A. No, sir, I have had once in my life to cut out the tank brakes, because it wouldn't work; that is done by the valve under the cylinder."

This proves nothing, because it does not undertake to show when an engine is properly equipped with brakes; it does not show what the general custom or usage with reference to equipping engines with brakes is or whether it is considered dangerous to operate an engine like this without brakes on the driving wheels. It is shown that this was a light engine and the question of what would be a proper equipment of an engine with brakes must be determined by many circumstances. It might be necessary to equip certain engines with certain kinds of brakes and other engines with certain other kinds of brakes. Railroads have the right to equip their engines in the way that the work that they are intended for can be best performed.

Bailey, in his work on Master's Liability for Injuries to Servants, page 7, says:

"It was said by a Pennsylvania court that 'the test of negligence in methods, machinery and appliances is the ordinary usages of business.'"

Again, on page 24, he says:

"The general rule requires of the master that he provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business.

"In Washington & G. R. Co. *v.* McDade, 135 U. S., 574, it was stated that the master was justified in using such machinery as the experience of trade and manufacture sanctioned and in The Maharajah, 40 Fed., 784, it was said: 'If, in any case, the master could be held liable for accidents happening to workmen whom he had hired to work upon a well-known machine in its usual condition, it could only be when it might fairly be said that, having reference to other machines, the machine in question was so hazardous as not to be fit for use.' Further the court say: 'As respects travel on steam railways, many of the courts of this country hold the carrier bound to keep pace with new inventions in the directions of safety. But this rule is an exceptional one, established upon grounds of public policy and for the safety of human life. It has never been applied to the relation of master and servant. It is not negligence, or a breach of legal duty, for a master to hire men to work upon an old machine, merely because there are newer and safer ones in use, even though the newer ones many have some additional safeguards.'

"In Jacobson *v.* Cornelius, 52 Hun., 377, N. Y. Supp., 306, it was held that the mere fact that machinery could be put in and out of gear in a better manner, and so have made the operation more safe, by the use of certain appliances, did not tend to show actionable negligence."

The case of The Maharajah, 40 Fed. Rep., 748, referred to above, was a libel for personal injuries, and the facts in that case are analagous to this case, and the libel was there dismissed, and is a strong case in support of our position here.

The case of Cassidy *v.* R. R. Co., 164 Mass., 168, is a case where an employee was injured while he was at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car, and there fastened by the plaintiff and a fellow servant a short time before. The court held in that case that the defect was an obvious one, of which the plaintiff had full knowledge, and in addition to that they say: "Nor is there any evidence that the hook used in this case was not a proper and usual hook to use, although another kind of hook was put in evidence."

In the case of Rooney *v.* Cordage Co., 161 Mass., 159, the court says:

"When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury *from the kind of machinery then openly used.* It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, '*I do not care to examine it;* I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage."

In the case of Toomey *v.* Donovan, 158 Mass., 237, the court says:

"The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use in such machines was immaterial. He agreed to work

on the machine as it was, and the defendants owed him no duty to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff cannot now claim that one should have been put on."

In the case of Moulton *v.* Gage *et al.*, 138 Mass., 393, the court said:

"The plaintiff was employed to work upon the platform as it was constructed. There was no hidden defect in it; it was what it appeared to be. The absence of the railing and the risks consequent thereon were obvious, and as well known to the plaintiff as to the defendants; and, upon familiar principles, the plaintiff cannot recover for injuries sustained in consequence of it."

In Jones *v.* Malvern Lumber Co., 58 Ark., 125, the court held:

"An employee is required to notice patent defects in machinery about which he is employed, and is bound to assume the risk thereof, to the same extent as if their existence had been within his actual knowledge."

In Brooks *v.* R. R. Co., 47 Fed., 688, it was said:

"The plaintiff, in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incident to that situation, including such as were liable to occur in consequence of any *visible* defect in the machinery and appliances supplied for use in connection with his work. The alleged defect in this engine was visible, and should have been, if it was not in fact, known to the plaintiff before he suffered the injury described in this complaint. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it, for he must be regarded as having guaranteed to the defendant his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of locomotive engines, draw-heads, and coupling apparatus to be able to recognize, upon seeing it, a dangerous defect of the character described."

In the case of Texas & Pacific Ry. Co. *v.* Rogers, 57 Fed., 381, the court said:

"A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks, as well as those incident to the business; and where he knows or ought to know of the defect in the appliances, and continues to work with the same, and receives injuries therefrom, he is treated as being guilty of contributory negligence, and cannot recover. The servant in order to recover for defects in the appliances in the business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had no equal means of knowing with the master."

In the case of Patton *v.* Texas & Pacific Ry. Co., 21 Sup. Ct. Rep., 275 (20 Am. & Eng. R. R. Cas. (N. S.), 53), the court said:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances, which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed."

The question of whether or not there were brakes on the engine was not left open to be determined by the jury, because the court found, as a matter of fact, from the evidence, that there were no brakes upon the engine and instructed the jury that the only question for them to determine in that respect was whether the plaintiff knew, or ought to have known, the fact that there were no brakes on the engine.

In the case of Tuttle *v.* Railway, 122 U. S., 194, the court says:

"For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards *v.* Rough, 53 Mich., 212; Hayden *v.* Smithville Man. Co., 29 Conn., 548."

These cases having been approved by the Supreme Court of the United States, we respectfully call the attention of this court to them as conclusive upon the proposition that the railroad company had a right to operate this engine without brakes upon the driving wheels, and that no negligence can be imputed to the railroad company for so doing.

The case of Denver Tramway Co. *v.* Nesbit, 45 Pacific Rep., 405, is so clearly in point and covers so many phases of this case that we quote the opinion in full as follows:

Goddard, J. (after stating the facts): "From the undisputed facts in this case, it appears that the appellee was engaged as conductor in operating a train of cars on appellant's street railway, and, while the train was in rapid motion, attempted to step from the rear of the motor to the trail car, and, by reason of the sudden bobbing up of the motor at the time, missed the hand rail on the trailer, and fell in such a way as to bring his foot and ankle under the rear wheel of the trailer. There was no fender or life guard on the trailer, and the company at the time was using trial cars both with and without the guard. Its absence or presence was open to observation, and easily discernible by the most casual inspection. Upon these conceded facts, we think it was the duty of the trial court to have withdrawn the case from the consideration of the jury, and have determined, as a matter of law, that they were insufficient to show liability on the part of the company.

"Aside from the question whether the conduct of the appellee in attempting to pass from the motor to the trail car while the train was running at a rapid rate of speed, and his fall under the circumstances, was not the proximate cause of the injury, there are apparent other and controlling reasons which exempt the company from liability. Its failure to place a guard upon the trail car cannot be said to constitute negligence *per se*, and, whatever weight may be given to such failure as a factor conducing to the injury of a stranger, it certainly constituted no breach of duty on the part of the company towards its employees to operate its cars without such guard. In other words, an employer is under no implied obligation, by the contract of employment, to furnish any particular kind of machinery, or to adopt the latest improvements and appliances. He is only bound to see that

that which he does employ is reasonably safe and suitable for the purpose for which it is designed. Wood, Mast. & Serv., 690; Railway Co. *v.* Smith, 18 Ill. App., 119; Railway Co. *v.* McCormick, 74 Ind., 440; Railway Co. *v.* Gildersleeve, 33 Mich., 133. While the want of a life guard may have enhanced the risk incident to appellee's employment, it did not constitute such a defect in the construction of the car as to render it unsafe or unsuitable for the business in which it was employed. As was said in Sweeney *v.* Envelope Co., 101 N. Y., 520, 5 N. E., 358: 'In the absence of defective construction or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from injuries arising in its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and where the machinery and implements of the employer's business are at the time of a certain kind, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards.' But even conceding that the want of a life guard rendered the car defective, and the company was guilty of a breach of its duty in failing to supply it, and in operating the train without it, such defect was certainly obvious, and one that the appellee could not have failed to observe if he had used his eyesight, and one that was as open and patent to him as to the company; and, if danger was to be apprehended from the use of a car in that condition, that result was equally apparent to him. Under these circumstances, he was precluded from recovering, by the well-settled rule that an employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge, equal to his employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby. Rogers *v.* Railway Co., 76 Tex., 502, 13 S. W., 540; Railway Co. *v.* Bradford, 66 Tex., 732, 2 S. W., 595; Power Co. *v.* Murphy, 115 Ind., 566, 18 N. E., 30; Sullivan *v.* Manufacturing Co., 113 Mass., 396; Quick *v.* Iron Co., 47 Minn., 361, 50 N. W., 244; Brewer *v.* Railway Co., 56 Mich., 620, 23 N. W., 440; Moulton *v.* Gage, 138 Mass., 390; Railway

Co. *v.* Flanigan, 77 Ill., 365; Ladd *v.* Railway Co., 119 Mass., 412; Whart. Neg., sec. 214, and cases cited; Wells *v.* Coe, 9 Colo., 159, 11 Pac., 50. Applying this rule to the facts of this case, it is clear that appellee was not entitled to recover, and the court below erred in refusing a verdict for defendant. The judgment is reversed, and cause remanded." Reversed.

We say that if the complaint can in any way be construed so as to charge negligence in operating this engine without brakes, that there is absolutely not a particle of proof to establish any such allegations.

In Patton *v.* R. R. Co., 21 Sup. Ct. Rep., 275, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. R. R. Co. *v.* Barrett, 166 U. S., 617. It is not sufficient for the employee to show that the employer may have been guilty of negligence; *the evidence must point to the fact that he was.*

In Railroad Co. *v.* Becker, 67 Ark., p. 7, the court approved the following instruction:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work and when this is overcome by positive proof that the appliances are defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from an alleged defect, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises."

There is no evidence in this record which would even tend to overcome or discharge any of the burdens resting upon the plaintiff in any of the foregoing respects.

In addition to the fact that there was no charge or proof of negligence upon which a verdict could be based,

there is still another and equally as obvious a reason why this case should not have been submitted to the jury, and that was that

The alleged defect as to the brakes was not the proximate cause of the injury.

There is no principle of law better settled than this, that notwithstanding the master may be negligent in the way of furnishing a safe place to work and safe appliances to use, yet this will not constitute actionable negligence unless the negligence was the proximate cause of the injury.

Undoubtedly the proximate cause of this injury was the presence of the horse on the track, without which the collision and accident could never have happened.

This court, in the case of R. R. *v.* Moseley, 57 Fed., 926, said:

"That negligence is the proximate cause of the injury from which the injury might or ought to have been foreseen or reasonably anticipated under the circumstances as its probable result; that negligence which sets in motion a train of events that in their natural sequence might or ought to be expected to produce an injury *if undisturbed by any independent intervening cause* is the proximate cause of the injury."

In the case of R. R. *v.* Elliott, 55 Fed., 951, this court said:

"But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, *but for the interposition of some new, independent cause that could not have been anticipated.* Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn

that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of time. A brakeman carelessly jostles a passenger from a moving train, and the effect follows at once. A tenant carelessly sows thistles in his landlord's field, and the effect follows months later, but not less surely. Again, an effect is sometimes the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate or moving cause; in other words, it is an accident,— a result that no one knowing the circumstances before the catastrophe could have reasonably anticipated. If an injury is the result of such an accident, or if the plaintiff fails to show that the negligence with which he charges the defendant was the proximate cause of the injury, there can be no recovery in his favor."

Now, in this case, if it can be said that it was negligence to operate an engine without brakes upon the driving wheels, it could not in itself have produced this injury. The engine had run about fifteen miles without any accident, and if it had not struck some obstruction on the track it would have gone to its destination without any accident. We can readily observe the distinction as laid down above by supposing that instead of an absence of brakes, there had been a broken axle or a broken wheel, and there had been sufficient evidence introduced to show that the company was negligent in respect thereto. Now, the natural and probable result of operating an engine with a broken axle or a broken wheel might result in a derailment of the engine. We must take into consideration another fact in the discussion of this question, and that is, how it was that this engine was to be backed up. Turning to the order of the dispatcher, we find that he directed it to be done carefully. He must have been of the opinion that if

this engine was backed up carefully it could be done without any very great danger to the fireman and engineer. This is true also of the fireman and the engineer, because Holloway says (Tr., p. 34):

"Q. You made a 'holler' on it and objected to it, and sent word to the dispatcher to let you turn?

A. Yes, sir; but after taking the matter under consideration, Mr. Davis and I had a talk in regard to turning the engine, and it being a case of emergency, I considered if they wanted me to back the engine up, they would use all the precautions on earth to give me a clear track and clear of all obstructions, and thinking, too, I could make the trip without any great danger to myself, I agreed to go, they being the master and me the servant. After I took the matter under consideration, I came to the conclusion I could take the run with perfect safety."

Now, of course, all of that part of his statement that he thought they would use all precautions on earth to give him a clear track and clear of all obstructions, is the merest nonsense, because he knew perfectly well that the railroad company was not sending a track-walker or a hand-car ahead of the engine to see that nothing was on the track. So that he left Brinkley under an order which he says he read, which order directed them to back up carefully, and he says after taking the matter under consideration, he thought it could be done with perfect safety. The accident did not occur by reason of the alleged defect in the brake, but it occurred by reason of the fact that a new and independent cause sprung up, and intervened, which was in nowise connected with the alleged defect in the engine, and a cause for which the company was not responsible, and for which no negligence can be imputed to them, because the court told the jury that the

presence of the animal upon the track could not be imputed to the railroad company as negligence.

Our position here cannot be any more clearly or appropriately expressed than it was by Judge Sanborn in the case of Motey *v.* Pickle Marble & Granite Co., 74 Fed., 158, where he said:

"Counsel for the plaintiff write in their brief:

"'The danger of the marble falling was evidently not so apparent as to attract the attention of an ordinarily prudent man, for the superintendent himself was in the same position, and was caught and injured at the same time as Motey.'

"If this be true, then the defendant was guilty of no actionable negligence here, and the plaintiff cannot recover; for an injury that could not have been foreseen or reasonably anticipated by any ordinarily prudent man as the natural result of the negligence is not actionable. Railway Co. *v.* Elliott, *supra*. If, on the other hand, this statement of counsel is incorrect, and if this injury could have been foreseen or reasonably anticipated by an ordinarily prudent man, then the plaintiff could have foreseen and anticipated it. He must be presumed to have been an ordinarily prudent man, for there is no evidence that he was not. He had every opportunity to foresee and anticipate the result. The danger and risk were neither secret nor occult. They were plain and open. They were but some of the ordinary risks and dangers of the employment in which he was engaged. They were dangers and risks which, under the well established rules of law, he had himself assumed. If the superintendent was negligent, then the plaintiff was; and if the negligence of either or both caused the injury, then the negligence of each contributed to it. A verdict for the plaintiff could not have been sustained upon this state of facts, and the court properly instructed the jury to return a verdict for the defendant."

Holloway throws some light on the question of what was the proximate cause of the injury, in his answer to interrogatory No. 19 (Tr., p. 42), when he says that the horse being on the trestle was the cause of the accident.

The case of Dickson v. Omaha & St. Louis R. R., 25 L. R. A., 320, is a case squarely in point. That was a case where a railroad company was charged with negligence by reason of the failure to fence its track and thereby permitting stock to enter the right of way and graze upon the track. The railroad company in that case tried to defend upon the theory that although they might have been negligent in that respect yet they said the fact that the engineer in that case was running at a higher rate of speed, contrary to the rules of the company, and did not have his train under control at the time, was the proximate cause of the injury.

The court came deliberately to the conclusion that while the engineer may have been negligent, yet the failure to maintain a fence was the proximate cause of the injury, and sustained a verdict against the railroad company. Now, the fact as to whether it was negligence to permit stock to stroll upon the track cannot alter the fact of what was the proximate cause of the injury. If the presence of the animal upon the track in that case was the proximate cause of the injury, it would still have been the proximate cause, regardless of whether the court had found that it was negligence for the animal to be upon the track or not. Now, in this case, the court declared that the presence of the animal on the track was not negligence, yet that cannot alter the fact that the presence of the animal was the proximate cause of the injury.

The court, in concluding its argument, say:

"We can speculate and theorize as we may as to what course of conduct might have avoided the disaster, but the fact remains that the direct cause was the obstruction of the

track, which was brought about by the negligence of defendant, and the consequences of which could not have been avoided by any degree of care deceased could have exercised. What might have been the result, had the rule been observed, is mere speculation."

If we are wrong in saying as a matter of law that the presence of the horse upon the track was the proximate cause of the injury, then there can be no question but that the instructions of the court along that line are very misleading if not wholly incorrect.

The court told the jury that the first, second, third, fourth, and fifth specifications of negligence set out in the complaint did not amount to negligence on the part of the defendant.

Then he instructed them as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

He then proceeded to direct the minds of the jury to what he meant by this, which was that if the engine could have been stopped after the animal was discovered had it been equipped with brakes, then plaintiff could recover, etc.

Now, while this instruction is good perhaps so far as it is applicable to the facts as to whether this engine could have been stopped after the animal was discovered on the track if it had been supplied with brakes upon the driving wheels, yet it is objectionable for the reason that it limited the scope of the inquiry and concentrated the minds of the jury upon

this one ground of alleged negligence in considering the question of what was the proximate cause of the injury. We think the court was correct in telling the jury that they could not consider the first, second, third, fourth, and fifth charges of negligence, as stated in the complaint, as grounds of negligence, but the jury, if they had been free to do so, might have found that one of these very things which the court told the jury was not negligence on the part of the railroad company was the proximate cause of the injury; for instance, the jury might have found that the absence of a light on the head of the tender was the proximate cause of the injury; they might have found that the fact of not placing a man on the footboard in front of the engine with a white and red light was the proximate cause of the injury, or they might have found that the fact of not providing and furnishing the engine with a pilot or cowcatcher was the proximate cause of the injury, or they might have found that the fact that this was a square or box engine and did not slope downward and forward so as to give a better view in front of the engine, was the proximate cause of the injury. It would have naturally followed then that if the jury had determined that something was the proximate cause of the injury which was not negligence on the part of the railroad company, that the plaintiff could not have recovered.

We think the peremptory instruction should have been given for the following reason also:

The court instructed the jury as follows:

"Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which

plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

"The plaintiff testified that while he did not see the horse that caused the accident, the engineer called to him, 'Lookout! lookout!' that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes, caused the accident whereby plaintiff was injured. On the other hand, the engineer testifies that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the locomotive was running backward; that there was no light in front; that the engineer kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact whether if there had been brakes the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

We do not think, from the evidence in this case, that any reasonable mind could come to the conclusion that this accident could have been avoided, even if the engine had been supplied with brakes. The court undertakes to submit

the question upon what it supposes to be a conflict of the testimony. We think the court erred in instructing the jury that there was a conflict upon this point, because we do not believe that any reasonable man can read this evidence and say that there is any real substantial conflict. (See in this connection the twenty-third assignment of error.)

HOLLOWAY testified (Tr., p. 27):

"I was putting my fire in and Davis was looking out, and the first thing you know he yelled out to me to lookout, and I had my face right out of the firebox and of course I was blinded; the fire was perfectly white in the firebox, and I shut my door and hit to get out, and my intention was to step out backward and put my foot on the step and catch myself the way the engine was going, to keep from falling, and as I stepped back, he applied the air, threw the air into the emergency, gave her all the power she had to stop her, and in an instant it struck the horse. Well, this tank and engine all bungled up together and caught me as I went to get out. I hallooed to him to release his air, I was caught, and he released his air and that caused the tank to separate, and I fell and dropped right on my knees in the tank, and as quick as I hit the tank floor, I left it flying, just as fast as I could get out of it. I went off in the brush."

Transcript, page 28, he testified:

"Q. About how far, according to your judgment, did the car run before it struck the horse, after Davis hallooed, 'Lookout! lookout!'?

A. Why, anywhere from fifty to seventy-five feet. I couldn't say exactly; *that is only a matter of guessing; but I suppose somewhere between fifty and seventy-five feet.*

Q. You say you were engaged at work, putting in a fire, when he hallooed, 'Lookout,' you closed the door as quick as you could, and when you straightened up, at that time, had the car struck the horse then?

A. No, sir; it hadn't struck the horse. As I turned my back it hit the horse.

Q. You turned back and was attempting to get out?

A. Yes, sir.

Q. You think then that it must have been anywhere from fifty to seventy-five feet from the time he hallooed, 'Lookout! lookout!'?

A. Yes, sir; it must have been from fifty to seventy-five feet."

It will be seen that this is merely a guess or an approximation by Holloway as to how far the engine ran after it struck the horse, as he does not state anywhere in the record that Davis either said at that time or at any time afterwards that at the time he hallooed, "lookout," he saw a horse upon the track or any other animal. It might have been that if Davis did halloo at that time, that Davis had some other reason for calling to him to lookout, because as we shall see later, Davis testified that he did not see the horse until he struck it.

But let us, for the sake of argument, assume that Davis did see the horse at the time he hallooed "lookout," we do not think that this is sufficient evidence of the fact that it was fifty or seventy-five feet from where he discovered the horse, because Holloway testified that at the time he was stooping down putting in his fire, and that he was blinded.

On cross-examination, it was sought to test Holloway's accuracy of distance.

He testified (Tr., p. 36) that after he got down out of the engine he walked back to flag the train which was following:

"Q. How long is that bridge?

A. I couldn't tell you; I didn't measure.

Q. About how long?

A. I walked across it, but I don't have any recollection.

Q. You can form some sort of an idea about how long that bridge is?

A. No, I cannot, because I don't remember anything about it.

Q. But you are undertaking to detail other things that took place. I must insist that you give some idea of about how long that bridge is?

A. I have no idea at all.

Q. You say you have no idea about how long that bridge was?

A. No, sir; I didn't pay any attention to the bridge at all; I was hurt.

Q. You were about the center of the bridge when you struck that horse?

A. Judging from about where the scars, the brake or something had been pulled over, but I never paid any attention to the distance."

Holloway tries to excuse himself for not observing the length of this bridge by saying that he was hurt, but yet in another place he states that after he was hurt he examined the engine to find out what was the matter with the whole outfit, and furthermore, he testifies that he was obliged by the rules of the company to go back and flag this train, so that this shows conclusively he was not so completely disabled as to destroy his power of observation or to keep him from the performance of his duty.

Now, how ridiculous it is for a man in a moving engine down over a fire to undertake to estimate distances, when he cannot even give a rough guess at the length of the bridge that he immediately afterwards walked over with his torch in his hand, and that, too, when he was engaged in an investigation as to what caused the accident.

We think this little incident very significant because he had ample opportunity to observe the length of the bridge, and shows that he was absolutely unwilling to furnish any test by which the accuracy of his estimated distance could be

determined. It is all right for a man to estimate fifty feet if he can follow it up with some good reasons to show why he thought it was fifty feet. If a man should say that he went from St. Louis to Chicago, we might have no reason to challenge his statement, but if, on cross-examination, he were asked whether he went by the way of the Wabash or the Illinois Central or the Big Four, or whether he walked, or rode in a buggy, and would be unable to tell, we think that would be quite a sufficient reason to say that he was not telling the truth at all about having gone to Chicago.

But even if it were fifty or seventy-five feet, it would not be of any advantage to Holloway in this case, because he introduced Will Barger, who testified on page 82 as follows:

"Q. Suppose that (the engine) was going at the rate of about seven miles, not to exceed seven or eight miles an hour, with no cars behind it, nothing but the engine and the tank, how far would that run on level ground, going seven or eight miles an hour, and where there was just the engine and the tank, and where both the engine and the tank were properly equipped with brakes, how far would that run before it would stop, after turning on the air brakes?

A. Why, about ninety feet, something like that; two rail lengths.

Q. If there were no brakes on the engine, take this engine, the same condition I have already stated, if there were no brakes on the engine, about how far would it go then before it could be stopped, with brakes on the tank and none on the engine?

A. Why, it would go further, of course; it would go about 100 or probably 125 feet."

The plaintiff introduced Mr. Farrell, who testified (Tr., p. 83):

"Q. Take an engine like that, and the same tank, on a level road, where both the engine and the tank are properly equipped with air brakes, how far would they run after the

air brake was applied to the engine and to the tank, ordinarily, on a level road?

A. Well, it is owing to how fast the engine was running at the time.

Q. Say running at a speed of seven or eight miles an hour?

A. Well, it ought to stop within sixty or seventy-five feet.

Q. Suppose there are no brakes on the engine, but brakes on the tank, how far would it go?

A. I think it would run forty or fifty feet farther, something like that."

So that if you take the evidence of his own witnesses, it would have been impossible to have prevented the striking of this animal after he claims Davis discovered it on the track.

Now, Engineer Davis, whose deposition was taken by the plaintiff, on redirect examination, testified as follows (Tr., p. 75):

"Q. At what rate of speed was you going when you ran over the horse?

A. About seven miles an hour.

Q. Were you keeping a lookout when you ran over the horse?

A. Yes.

Q. If you were keeping a lookout, how far ahead was the horse when it was first discovered?

A. *I did not see the horse until we had ran over it, and had stopped.*

Q. *Did you apply your brakes at all?*

A. *I did not until after I had ran over the horse.*"

To substantiate Davis in this respect, the defendant below introduced witnesses to show that even if it was true as testified by Holloway that the horse was discovered fifty or seventy-five feet before it was struck and the air was applied promptly, as Holloway states that it was, that even without

brakes on the engine, it could have been stopped before the collision occurred.

E. M. ROBERTS testified (Tr., p. 66) as follows:

"Q. Now, Mr. Roberts, I will ask you, if that engine was traveling say six or seven miles an hour, under perfect control, and an animal should be discovered on the track, say fifty or seventy-five feet in front of the engine, whether it could be stopped or not?

A. Yes, sir; the air should be plenty strong to stop it in less than that many feet. It ought to stop it in thirty-five feet or thirty feet — forty feet at the outside."

He reiterated this statement in his cross-examination, page 67.

C. H. WELCH testified (Tr., p. 70) as follows:

"Q. Now, Mr. Welch, suppose that engine, equipped as it was, with brakes on the tender, and under perfect control, running five or six or seven miles an hour, and an object was seen, could it be stopped in time to prevent running over the object?

A. Well, an engine that is not moving more than six or seven miles an hour, with a good tank brake, ought to stop in forty-five to fifty feet, if they are not making more speed than that."

He reiterated this statement in his cross-examination on transcript, page 71.

It will thus be seen that even taking Holloway's theory that it was fifty or seventy-five feet, the engineer could have easily stopped the engine. We do not think from this evidence that any reasonable jury could find that the engineer saw this horse before it was struck, and even if he did that he could not have stopped the engine before striking it. The engineer is fully corroborated by all the circumstances in this case, as we have observed before, because it was a dark, misty night. The engine had no headlight. The engine

was a square one, so that a view could not be obtained from where the engineer was sitting, and Holloway charges all of these things as negligence in his complaint, and obviously for the reason that he was then trying to show that the company had made it impossible to see any obstructions on the track, and when the court rules them out, why, then, in order to make a case, he tried to make it appear that notwithstanding these things, the engineer was able to see the horse on the track some fifty or seventy-five feet. The engineer is further corroborated by the fact that the horse was dark colored.

Now, we say that it is a physical impossibility, and the jury were no more justified under these circumstances in believing that the engineer saw this horse before they struck it, than they would have been justified in believing that white was black simply because Holloway testified to that fact. It was physically impossible and his statement is unreasonable. The evidence of Mr. House with the exhibits thereto attached as found on the transcript, page 88, was for the purpose of contradicting Davis, but he was contradicting his own witness, because he took his deposition, and furthermore shows that even if Davis had ever made any such statements as claimed, that they were made at a time when he was consulting with Mr. House about bringing a suit in his own behalf. The facts and circumstances corroborate Davis in his testimony and tend to establish the absolute accuracy of his statement, and more than overcome any weight that ought to be given to the contradiction as found in the evidence of Holloway or Mr. House.

There is still another reason why the peremptory instruction should have been given, and that is, that it appears from Holloway's testimony that it was a physical impossibility to be injured in the way he says he was.

We must remember now that this happened on a track running east and west from Little Rock to Memphis. The engine was headed west towards Little Rock and was backing up with the tender forward in the direction of Memphis. The engineer's side of an engine is on the right-hand side, which would throw him on the north side of the track, and the fireman's side is on the left-hand side, which would throw him on the south side of the track.

On transcript, page 47, Holloway testified:

"Q. Well, after you got down, you stated this morning that you examined the engine; just state how the engine stood?

A. The rails on either side were turned over and the engine was on the bottom of the rail.

Q. Were the wheels of the tender on the bottom of the rail?

A. No, sir; they were off.

Q. How much off?

A. I suppose something like twenty or thirty inches.

Q. It had sort of gone around to one side?

A. Yes, sir; it veered a little as it left the track.

Q. About how much had it veered?

A. About thirty inches, I suppose, somewhere between twenty and thirty inches.

Q. Which way did it veer?

A. To the south.

Q. Which side did you go out on?

A. I went out on the engineer's side.

Q. On which side of the engine does the engineer sit?

A. The right-hand side."

Now, it will be seen from this that the tank or tender when it struck the horse left the track on the south side and

veered to the south about twenty or thirty inches. The effect of this must necessarily have been to throw the ends of the engine and the tank or tender on the fireman's side closer together, but Holloway states that he went out on the engineer's side, and the ends of the engine and the tank or tender on the engineer's side must, of necessity, have been thrown farther apart and a wider opening made at the point where Holloway says he left the engine.

This was clearly a case of assumed risk.

If the facts in this case do not make this an assumed risk pure and simple, it would be hard to state a case where the rule could be applied. Holloway certainly had no right to rely upon any presumption as to the safety of this engine. It had been delivered to him with the distinct understanding that it was going to the shops for a general overhauling; that it was an "old scrap pile." The traveling engineer, having thus informed Holloway as to the condition of this engine, it seems to us that the presumption in this case as to safe machinery, etc., would be exactly reversed and that Holloway would have no right to presume that any part of the machinery was in safe condition unless that particular part had been pointed out to him at the time he accepted service on the engine and he was informed that it was safe. How much more notice could be given to the servant than was given in this case? Then, again, it is not shown that Holloway was placed in a sudden position of danger without time to reflect or opportunity to investigate. He states himself that he sat down upon the ties on the outside of the engine just under the gangway to make some temporary repairs. He

could have placed himself in no better position to observe whether there were any brakes on the engine or not, than when he occupied this position. He testifies that he was cautioned to watch the brasses on the pony trucks which are just ahead of the driving wheels, and in doing this he must necessarily have been brought in close contact with the driving wheels and thus the very finest opportunity that could have been given him was afforded for observing the condition of the brakes. Then, again, when they arrived at Brinkley and were informed that it would probably be necessary for this engine to return, he states that he left the dispatcher's office just after he and Davis returned from supper and went to his engine "to get ready to go out, he had his lights to fix, his ash pan to clean, and to get everything ready." He knew then that it was a "scrap pile;" he knew it was likely they were going to back up that night. He was thus afforded the very best and fullest opportunities to observe and the very strongest reasons existed why he should observe. Then, when he takes the stand and tells us absolutely that he did not observe and that it was not his business to observe, and yet tells us that these defects of which he complains were perfectly patent and obvious, then it seems to us that the question of whether this was an assumed risk on his part is not even debatable.

We have read case after case on the subject of assumed risks in connection with this case, and the doctrine is so well settled and the facts seems to bring Holloway so clearly within the doctrine, that we are not going to tax the patience of the court with authorities upon this question.

For any or all of the foregoing reasons we think the peremptory instruction should have been given.

II.

The question of contributory negligence.

The defendant asked several instructions on the question of contributory negligence, which were refused by the court. These instructions are embraced in the eleventh, twelfth, thirteenth, and fourteenth assignments of error.

These instructions we think embodied correct principles of law, as applicable to this cause, and should have been given by the court. The court excluded entirely any question of contributory negligence on the part of the plaintiff. He told them that if Holloway knew or by the exercise of reasonable care ought to have known, that there were no brakes on the engine, and knowing this fact, that, as a reasonably prudent man, he would not have undertaken to make this trip, then he could not recover. This instruction fell far short of the requirements of this case. There is a well defined and marked distinction between the doctrine of assumed risks and the doctrine of contributory negligence. The court evidently recognized this fact in his instructions and came to the conclusion that if this was not an assumed risk on the part of Holloway, then the company was liable. In the discussion of these instructions refused, it will be well for us to advert for a short time to the record to ascertain something of the facts as to how this engine came to be at Brinkley, and how it was that the engine was to be backed up immediately from Brinkley to Hulbert.

It appears that Holloway left Brinkley at 5 o'clock, October 30, the morning of the injury, on engine C., O. & G. No. 33, with Davis as engineer. Brinkley is a middle

division between Little Rock and Memphis (Tr., p. 25). The distance from Brinkley to Hulbert is about sixty miles and Hulbert is about nine miles east of Hopefield (Tr., p. 25). They arrievd at Hulbert about noon (Tr., p. 34). When they arrived there they found W. & B. Engine No. 3 and received it from the traveling engineer, Mr. Waters. He said that the traveling engineer told him that No. 3 was going to the shops for repairs, as she had worn out all her brasses in the pony trucks ahead, and he used car brasses there for a makeshift, and the hose on the left side from the tank to the injector was bursted, and he said he wrapped that with some old bagging, and her blower pipe, the valve was off of it entirely, and it filled the cab with steam and water. He had a plug in there and kept it wrapped with waste. He said that the blow pipe, commonly called the blower, comes out of the boiler on the engine, comes back under the side of the boiler and goes up in the smokestack (Tr., p. 32). He further stated (Tr., p. 27) that the top hinge of the door to the firebox was broken off and he couldn't swing it open with the chain; that he had to pick it up and set it over on a latch, and in fact, he said the engine was a regular "*old scrap pile.*" He further stated (Tr., p. 32) that Waters told them that he had put some car brasses in the pony trucks, which would do until they could get to the shops, and told them to watch her and keep her from running hot and cool her down, and repack her and probably she would get to running cool after she formed a seat in the brasses.

On page 46 of the transcript he testified that the traveling engineer said he was sending her into the shops for an overhauling. He testified that he wrapped the hose right

under the tank as it was leaking. That to do this, he sat down on the edge of the ties on the outside right under the gangway, which is under the front trucks of the tank (Tr., p. 46). On transcript, page 47, he said that Mr. Davis, the engineer, asked Waters what was the matter with her, and Waters said, "She has got to go in the shops and be overhauled all over." The traveling engineer was there superintending the exchange of engines, oil, waste, cans, and everything.

On page 34 of the transcript, he testified that they registered out of Hulbert at about 1 o'clock to go to Brinkley on this engine No. 3; that they arrived there about 7:20 p. m. This was the first time that he had ever been on this engine. The engine was running light, that is, nothing but the engine and tank (Tr., p. 25).

On page 26 of the transcript, he testified that when they got to Brinkley they were told that they had to return to Hulbert; that they got off and went and got their supper at the Arlington Hotel, and after they came back from supper he and the engineer walked up to the office to ascertain if the operator would allow them to turn the engine, but receiving no answer, he said that he left and told Davis that he was going and get the engine ready to go out. He had his lights to fix, ash pan to clean, and to get everything ready. That after awhile, Davis came out and showed him something that he had written across a blank telegraph form sheet, which stated that the dispatcher said he did not want the engine turned.

He testified (Tr., p. 36) that they had been on the road then twenty-two hours, and would have had the right to demand rest if they had wanted it.

He testified (Tr., p. 32) that something was said by dispatcher in charge at Brinkley about backing the engine onto the train and carrying it down. (It will be shown a little later that there was a through freight at Brinkley at this time ready to go east.) The dispatcher told them to go in on the house track and this through train would pull in on the passing track, and engine No. 3 could drop in behind and this train would pull engine No. 3 down to Hulbert. (This seems to have been the plan at this time as to the way this engine No. 3 would be taken back to Hulbert.)

We will now turn to the scene of the night dispatcher's office in Little Rock, who was directing the movement of this engine.

The operator, Wells, testified (Tr., p. 72) that the engine left Hulbert at 1:05 p. m.; that it had been started into Little Rock for repairs, and while on the way from Hulbert to Brinkley, another engine which was provided at Hulbert was found to be in a worse fix than this one, and this engine No. 3 was stopped at Brinkley and kept there until the other engine could be heard from, to see which could be repaired first, and it was finally decided to run this engine No. 3 back to Hulbert to take the place of the other one, as it was in better shape than the one at Hulbert. They had to do some work on this engine No. 3 before it could go back; had some brasses to put in and one thing and another. That it got there about 7 o'clock in the evening, and it was 9 or 10 before it was ready to go back. There was another train going east about the time this engine was ready to go, and that Davis and Holloway were complaining about wanting rest, and they had no other crew that he knew of to

take this engine No. 3 back in case Holloway and Davis called for rest, and he tried to get them out of there as soon as he could on that account. He testified that there was considerable correspondence between himself and the operator at Brinkley with regard to the engine going out of there, and how it should go, and the delay that was going on, and the operator at Brinkley said something about turning the engine, but that he did not know whether he wanted to ask for an order to have it turned or not, but did not think he did; that he instructed the operator at Brinkley to let them go whichever way they wanted to go. He said he told them if they wanted to back up, all right, and if they didn't, all right. That he didn't give them any positive instructions either way until they decided to go, backing up, and then he gave them their orders (Tr., p. 72).

On cross-examination (Tr., p. 73) he testified that he understood that they had decided to back up, and that the order which he gave them was based upon their decision to run this way.

On re-direct examination (Tr., p. 74) he testified that he understood that Holloway was kicking for rest, that he had a right to demand rest, and that if he demanded it, he would necessarily have had to give it to him (Tr., p. 76).

Witness Wells is corroborated by Witness Davis, the engineer, as to the request to turn the engine, as he testifies on page 75 of the transcript as follows:

"Q. Was there any request made by you or your fireman of the train dispatcher for permission to reverse the engine?

A. I don't remember of any such request being made by myself or by my fireman."

The situation then seems to have been about this: That this engine No. 3, arrived at Brinkley about 7 o'clock p. m.; the operator there had been instructed to stop them, as it was likely that it would be necessary for this engine to return to Hulbert instead of going in to Little Rock; Davis and Holloway were jouring, because they had been on the road for twenty-two hours and wanted rest, and were also objecting to backing this engine from Brinkley to Hulbert; Wells did not care very much about whether they went backward or forward, and would not have objected to the engine being turned. This through freight was there and they had about decided to hook this engine No. 3 on to this freight train, and pull the engine down to Hulbert. In the meantime, the operator at Little Rock was anxious to get this engine back to Hulbert, and as the engineer and fireman were threatening to demand rest unless they got out right away, and not knowing that they had about decided to hook on to the back end of this freight train, and having also understood that they had decided to back the engine up, issued an order for the engine to back up carefully from Brinkley to Hulbert. Doubtless, if he had known that the engineer and Holloway were willing to wait for this freight train and go out hooked on to the rear end of it, he would have readily consented to that. It does not appear, however, that he had any knowledge of this intended arrangement at all. The operator's indifference as to how the engine should go, was doubtless influenced by the fact that it was then but 10 o'clock at night and they had practically the whole night before them to run sixty miles, and that if they ran very carefully the trip could be made with the engine backing that way without very much

risk, and was doubtless influenced more by the fact, as explained by Mr. Roberts in his testimony on page 68 of the transcript, that the engine as it then stood was facing as it would have to be in order to work in the pit at Hulbert; that if they had turned the engine at Brinkley to run it forward to Hulbert, that it would then have been necessary to run from Hulbert over to Hopefield in order to turn it, and in that event it would have been necessary to back the engine up from Hopefield back to Hulbert, so that in any event, in order to get the engine back to Hulbert facing as it must be in order to work in the pit, it would have been necessary for it to back up either this side or the other side of Hulbert.

Roberts understood that the engineer and Holloway were impatient because they were being held there as he testifies (Tr., p. 66) that he had a conversation with Davis, at which Holloway was present, in which Davis told him that if he did not go out right away that he and Holloway were going to bed.

From the foregoing, then, it appears that the engineer and Holloway were more responsible for this engine backing up that night than anyone else. If it was a dangerous thing to back this engine up, no one was certainly more impressed with the fact than Holloway himself, because he testifies on page 34 of the transcript that he made a "holler" on running the engine backward. He states on page 35 of the transcript that he knew it was a more dangerous thing to back up than to go ahead. In his statement on page 45 of the transcript, he stated that he remarked that night that this was the first time that he had ever been ordered out to commit suicide.

Roberts testified (Tr., p. 66) that he had a conversation with Davis in the presence of Holloway, and that they considered it unsafe and dangerous to back up through the bottoms at night, as the track was full of stock lying down on the track.

Furthermore, no one was better acquainted with the condition and kind of the engine that they had to back up with. Holloway had been fully informed of the condition of that engine, and he, himself, it seems, had made some temporary repairs and was informed, as he expresses it, that it was a veritable "old scrap pile." He knew that there was no cowcatcher on the tender; he knew also there was no light there; he charges in his complaint as one ground of negligence that it was a square or box engine, and the tank or tender did not slope forward and downward so as to give a better view in front of the engine; also that it was in the nighttime when it was dark and misty. So that he was fully informed as to the danger of this move, recognized it himself, and objected to it at the time. He started out on this trip, then, at this time knowing the dangers which confronted them, and how in the world the court could ignore the question of contributory negligence in this case is a thing that we are utterly unable to understand.

The case of Railroad *v.* Jones, 95 U. S., 439, fits this case exactly, and is good authority that the court has committed error in this respect.

This case is particularly conclusive as to the instruction contained in the twelfth assignment of error, because it told the jury that if this was a dangerous method to ride so far as obstructions on the track and roadbed were concerned,

and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover, regardless of whether the engine was defective in not having brakes on its driving wheels, and regardless of whether or not plaintiff had knowledge of that fact.

Now, in the Jones case the situation was precisely similar to this. The court simply in effect held that it was a dangerous place to ride upon the pilot. They held that it was negligence on the part of the railroad company to leave the cars with which the engine collided standing upon the track, and that Jones was guilty of contributory negligence, notwithstanding the fact that he had no knowledge of the presence of the cars upon that track. Now how can the situation be changed in this case, simply because Holloway alleges that he had no knowledge of the absence of brakes on this engine.

Admitting, for the sake of argument, that in this case it was negligence not to have brakes on the engine, it would only place this case on an equal footing with the Jones case, in which it was held that the presence of the cars with which the engine collided on the track, was negligence on the part of the company.

The case of Kresanowski *v.* Northern Pac. R. Co., 18 Fed. Rep., 229, which has been so often cited with approval by this court, we think particularly applicable to the instruction contained in the fourteenth assignment, because it shows that the engine in that case was the only means of transportation provided by the master, and that it was necessary for some of the employees to ride on the pilot of the engine.

This is not a case where an employee is suddenly called upon to take a dangerous position without any time for reflection or previous knowledge of the dangers attending the work assigned to him, nor a case of sudden emergency. The plaintiff recognized the danger of backing up this engine as soon as it was suggested, and it is shown that it is not a case where he was likely to lose his position from any insubordination or refusal to obey orders, but on the other hand, it is shown conclusively that there were at least three other things that could have been done had the plaintiff so desired and insisted upon them, either one of which would have been safer than backing the engine up. First, the operator states that if he had been requested to permit them to turn the engine he would have done so. Davis testifies that such request was never made of the operator, and Davis is the only person who remained in the office during the time the conversation was going on over the wires. It appears from Holloway's own testimony that he left the office immediately after he and Davis went there after supper, for the purpose of getting his engine ready, and it is not shown that he ever returned; second, if Holloway had not exhibited such impatience to get away, doubtless the arrangement would have been carried out to hook his engine on the rear of the freight train, which the record shows left Brinkley a short time after this engine and came up to the engine within a very few minutes after it was wrecked; and third, he had a perfect right to demand rest, which Dispatcher Wells says he would have been compelled to have given him, and this would have enabled them to make the trip the next morning by daylight. So that Holloway is

as much responsible, if not more so, for the engine leaving Brinkley that night backing up than anyone else.

This was no more of an emergency than it was that any other train should be run on time and the work performed without delay. In fact, Holloway, notwithstanding the danger, which he appreciated, was the real cause of the rush and his whole conduct shows that he was not very careful about what he did nor how he did it. A striking illustration of this is found in his evidence on page 27 of the transcript:

"Well, we were going down about three and one-half miles this side, or perhaps four and one-half miles this side of Palestine station, and Davis says to me, 'There is a road crossing here some place, but I don't know exactly where it is at,' and I said, 'That is all right, I will get up and ring my bell, and if there is anybody here, they will hear us coming.'"

He was doubtless mad and growing reckless because it was necessary to send this engine back to Hulbert that night.

In the case of Ry. *v.* Davis, 53 Fed, 63, the court said:

"If he voluntarily and unnecessarily places himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position would know was dangerous, and is thereby injured, when there are other positions that he might take in the discharge of his duty that are safe, he cannot recover of the defendant, although the latter is in some degree negligent He cannot recklessly and unnecessarily expose himself to a known danger, and then recover for an injury to which such exposure contributed."

This doctrine was reiterated and reinforced by many citations in Union Pacific Ry. Co. *v.* Jarvi, 53 Fed. Rep., 68.

In the case of Lothrop *v.* Fitchburg R. R., 150 Mass., 424, the court said:

"The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated

and understood by the servant as well as by the master, or by anyone else, and, when the servant has as good an opportunity as the master or anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care."

In Gowen *v.* Harley, 56 Fed., 983, this court said:

"Where there is a natural and safe method of performing his service, and the servant carelessly pursues a method that is obviously more dangerous, he is guilty of contributory negligence and cannot recover."

In Motey *v.* Pickle Marble & Granite Co., 74 Fed., 157, the court said:

"If the negligence of the servant is one of the proximate causes of his injury; if his own negligence contributed to the unfortunate result, he cannot recover of his master, even though the negligence of the master also contributed to it."

We do not deem it worth while to extend the discussion along these lines. We think that these facts and these authorities clearly established such a case of contributory negligence on the part of Holloway as would have justified the court in taking the case from the jury on that ground. But if we are mistaken in this, we certainly cannot be mistaken in the proposition that there was at least enough negligence shown to have submitted the question of contributory negligence to the jury, notwithstanding any negligence on the part of the railroad company, and notwithstanding any knowledge which Holloway might or might not have had as to the alleged negligence of the railroad company.

His own statements repeatedly made that he did not make the slightest effort to see whether the engine had brakes

because he had "no business to look," and did not have any right to inspect the engine, make him guilty of contributory negligence. An inspection was not required. A casual glance was all that was necessary.

III.

We next invite the court's attention to the sixteenth and seventeenth assignments of error, which we may properly consider together. The instructions there asked undoubtedly enunciated correct principles of law as applied to this case. The proof shows that this was at least a hazardous undertaking. It shows further that Holloway had been informed of the defective condition of this engine in many respects, and that it was being sent into the shops for a general overhauling. He certainly could not, under these circumstances, have relied in any respect upon the safety of the machinery to protect him, and knowing that the engine was in bad condition, a greater degree of diligence was required of him in regard to the inspection of this engine before leaving Brinkley and the use of it on the trip than would have been required on an ordinary trip with an engine which he had a right to suppose was in good condition.

Bailey, in his work on Master's Liability for Injuries to Servant, p. 169, says:

"So, when the servant uses machinery known to be defective, he is bound to use special precautions, and if he fails to do so, and is injured, he cannot charge the master with liability."

In Motey *v.* Pickle Marble & Granite Co., 74 Fed., 157, this court said:

"It is the duty of the servant to exercise that degree of care commensurate with the character of his occupation and *the occasion*, which a reasonably prudent person would employ under like circumstances, in order to protect himself from injury, and if he fails to exercise that care, he cannot recover of the master for an injury to which his own negligence has contributed."

Not only that, but rule 200, hereinbefore referred to, required him to examine the machinery he was to use and see that it was reasonably safe for the purposes for which it was intended.

The record shows *that Holloway willfully disregarded* this duty which was imposed upon him. On page 29 of the transcript he says, under the books of rules I was working under, I was compelled to do my duty as a fireman.

On page 30 of the transcript, he testified:

"Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?
A. No, sir, *I have no right to inspect an engine*; I am no engine inspector; I am a locomotive fireman."

On page 37 of the transcript, he testified:

"Q. When you are firing what do you look after?
A. I look after my coal, water and lights.
Q. You don't look at anything?
A. I have got no business knowing any machinery at all, because I am not an engine inspector."

He cannot claim that the company has been derelict in any duty towards him where he displays such willful disregard of the reasonable requirements which both the rules of the company and the general principles of law imposed upon him, and especially in a case where he was put upon notice of the fact that it was, above all things, in this par-

ticular case, very important that he should be very careful and very observant.

These instructions were highly important, and especially so, in view of the instruction given in the twenty-second assignment of error, in which the court said:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe."

And again in the sixth assignment of error in which the court used the expression "without hunting for it."

As applied to the facts in this case, the instructions given were directly contrary to rule 200 of the company, and also to the authorities quoted above.

In Patton *v.* T. & P. Ry. Co., 1 Sup. Ct. Rep. Cas., 275, 20 A. & E. R. R. Cas. (N. S.), 53, the court said:

"He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases, it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the places or the machinery."

IV.

We next call the court's attention to the eighteenth, nineteenth and twenty-second assignments of error.

In the instructions contained in each of the said assignments of error, the court instructed the jury that the law requires railroads to furnish its employees working tools which are reasonably safe and a place to work in which is

reasonably safe. The court fell into the same error in the instruction set out in the fifth assignment of error.

The duty the master owes to his servants is not to furnish machinery in a reasonably safe condition, but only to use reasonable or ordinary care to furnish machinery in a reasonably safe condition. This is the law everywhere and this precise question was raised in the case of L. & N. R. R. Co. *v.* Johnson, 81 Fed., 680, and the case was reversed and remanded for a new trial. The court there said:

"In respect to the duty of the railroad company the court erroneously instructed that the company 'undertook to furnish the plaintiff a reasonably safe place to work,' and to maintain the same. The instruction in full appears in the margin. The rule is well settled, and as early as 1894, in Railroad Co. *v.* Meyers, 24 U. S. App., 295, 11 C. C. A., 439, and 63 Fed., 793, had been declared by this court, that 'the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair.' See, also, same case on second appeal, 46 U. S. App., 226, 22 C. C. A., 268, and 76 Fed., 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such unnecessary width as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: 'If, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case.' It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were

not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use, it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty to provide a safe working place, was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanations made so clear as to leave no room for reasonable mistake."

In the case of R. R. Co. *v.* Needham, 69 Fed., 823, this court (quoting from the syllabus) said:

"The extent of the duty of the master to the servant in the matter of place of service is to exercise ordinary care to furnish him a reasonably safe place and to use ordinary care and diligence to keep it in a reasonably safe condition, and it is error for the court to charge the jury that it is the master's duty to furnish the servant a reasonably safe place. This court has repeatedly so held."

Bailey, in his work on Master's Liability for Injuries to Servant, pages 2 and 3, says:

"Among the implied obligations resting upon the master are, first, that he shall provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. In the performance of these duties the master is bound to the exercise of reasonable and ordinary care, and such only."

In the foot-note to the text he gives a long list of authorities supporting that position.

The defendant in error may attempt to get around this error by saying that it was practically admitted by the plaintiff in error that this engine was not in a reasonably safe con-

dition, but it must not be forgotten that every particle of the evidence as to the defective condition of this engine comes from Holloway himself, and that his knowledge was derived from the traveling engineer at the time he accepted service on the engine. Holloway's claim is, that he knew of the other defects in the engine, but he did not know that there were no brakes upon the driving wheels which we now understand he claims was a defect. By the allegations of his own complaint it shows that such brakes as there were on the engine were in a first-class condition and worked well. In fact, it seems that the brakes were about the only thing that were in good condition. Now, the very same admission which he claims that we made with reference to the condition of the engine was only to such parts of it as he was fully advised. If he was advised as to the condition of the engine, then he assumed the risk, and the instruction was abstract and calculated to mislead the jury in respect to the risk assumed by the defendant in error and in respect to the duty which the plaintiff in error owed him on account of the known defective condition of the engine. We insist and maintain that the brakes were in good condition and that no negligence of any kind was shown in respect thereto, and we hold that there is nothing in the record to show that it was negligence to use or operate an engine of this kind engaged in this work which did not have brakes on the driving wheels. The same process of reasoning that will make this a harmless error on the part of the court must necessarily make Holloway assume the risk. If Holloway seeks to avoid the risk assumed, then we invoke the rules of law required to establish negligence and the presumptions obtaining in our favor. If it is said the error

was harmless, Holloway assumes the risk. If he did not assume the risk, the error is prejudicial.

Furthermore, it seems to us that there is a direct conflict in the instructions of the court, in this: In the instructions he gave the jury when they were sent to inspect the engine, he said:

"A man cannot shut his eyes and say he did not want to see anything which a reasonable man could not help but see if he kept his eyes open."

And in the instruction contained in the twenty-second assignment of error, this occurs:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe."

Under the evidence in this case, these statements cannot be reconciled and do not state the issue involved. The servant has no right to rest upon any presumption as to machinery openly used where he has as good an opportunity as the master to observe the kind of machinery furnished him and which is openly used.

V.

The court erred in that part of its instruction set out in the twentieth assignment of error, for the reason that it assumes, and in effect declares, as a matter of law, that the running of this engine backward without any brakes upon the driving wheels was negligence on the part of the railroad company.

It is also erroneous in this, that it requires the jury to eliminate any question of contributory negligence and only submits the question of assumed risks upon condition that

the jury first find that Holloway had no knowledge of the fact that there were no brakes on the driving wheels of the engine.

For a fuller discussion see our remarks, *supra,* on questions of contributory negligence and assumed risk.

VI.

The court erred in that part of its charge contained in the twenty-first assignment of error, because we think that the court should have told the jury, as a matter of law, that Holloway was presumed to have knowledge of the absence of the brakes. It also eliminated any question of contributory negligence.

VII.

The court erred in that part of its instruction contained in the twenty-third specification of error, for the reason that we do not think that there was any substantial conflict in the evidence on the question to which it referred, for the reasons mentioned, *supra.*

VIII.

The court erred in giving that part of its charge set out in the twenty-fourth specification of error, for the reasons heretofore given, in connection with what we have had to say on the proximate cause of the injury and the question of contributory negligence and assumed risk.

IX.

We will next consider the fourth, fifth, seventh and eighth assignments of error together. It was agreed between the parties, that the jury might wiew an engine exactly like the one on which the plaintiff was at the time of the accident.

Pictures of the engine viewed, taken both from the engineer's and fireman's sides, are made a part of the record and found on pages 95 and 96.

These errors occurred in the instruction of the court to the jury when sent to view the engine. The whole charge is found on pages 92, 93 and 94 of the record.

The court erred in undertaking to tell the jury what methods they should adopt in determining whether the fireman could discover the presence or absence of the brakes upon the engine. The jury should have been left entirely free in this respect.

The court erred in instructing the jury that it was not the duty of the fireman *to look over and examine it.* The law does require servants to use their eyes as to the kind of machinery openly used and to observe all patent defects, if there are any. If the absence of brakes upon the engine in this case can be considered a defect, this instruction was particularly improper, in view of the fact that it was a patent defect and in view of the information which Holloway had received from the traveling engineer in regard to this engine at Hulbert.

The court also erred in stating the duty of the master to the servant in furnishing machinery. The court of appeals held that this was an "unquestionable error."

The court of appeals also held, in effect, that the instruction to the jury "to go inside and try to put themselves only in the same place that a fireman would naturally occupy, and then, occupying that place, to determine whether the wheels of the engine, on which the brakes would be, could be seen from there without looking for them while a

man was employed for several hours doing work on an engine as a fireman," was error, but that it was cured by other portions of the charge referred to in its opinion. The court does not tell us how these other portions of the charge cured the error, and we are unable to appreciate the force of the court's argument in this respect. In addition, we do not understand how erroneous portions of a charge can be cured by other portions of the same charge which were, we think, equally as erroneous. All the witnesses on both sides, including Holloway, admitted and stated that the brakes upon an engine occupy a most conspicuous place and are in plain view. The pictures of the engine found in the record also show this, and there is absolutely no room for controversy on this point. This brings us to the real merits of the exceptions to the court's charge, and that is this, that the proper purpose of the view by the jury is not to furnish evidence upon which the verdict is to be founded, but to enable the jury better to understand and apply the evidence which is given in court. The jury could not have understood the charge of the court otherwise than as authorizing them to base their conclusions and findings entirely upon what they saw, regardless of whether it was supported by any sworn testimony or not, and, in fact, the court told the jury the view taken was a part of the evidence. This, we submit, was not proper.

In the case of Railroad v. Bowen, 40 Ind., 548, the court said:

"In Close v. Samm, 27 Iowa, 503, this question was under consideration. The district court had instructed the jury that they should consider all the evidence in the case and all the facts and circumstances disclosed on the trial,

including their personal examination, etc. The question was presented to the supreme court whether this instruction was correct or not, and under a statute similar to our section found in the civil code, the court said: 'The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby to more intelligently apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties and in respect to which no opportunity for cross examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set aside without knowing the facts ascertained by such personal examination by the jury. It is a general rule certainly, if not universal, that the jury must base their verdict upon the evidence delivered to them in open court and they may not take into consideration facts known to them personally, but outside of the evidence introduced before them in court. If a party would avail himself of the facts known to a juror he must have him sworn and examined as other witnesses.'"

Attached to the case of People v. Thorn, 42 L. R. A., 385, is a very exhaustive and complete brief as to the nature and effect of the view by the jury and the different theories relating thereto, and also some suggested explanations of apparent conflicts.

In the case of Benton v. State, 30 Ark., p. 328, the court said:

"The jury is merely to be conducted to and shown the place to be viewed and the view is made by the jurors *to enable them the better to understand the testimony given by the witnesses,* but though no witnesses are examined at the view, yet the jurors, from their observation of the place and it surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross examination."

For additional list of authorities holding that the view of the *locus in quo* by the jury has no independent probative force, but is allowed merely to enable the jury to better understand and apply the sworn testimony in the case, see

A. & E. Ency. of Law, 2nd Ed., Vol. 11, 540, Note 3.

This case is not analogous to the cases of McReynolds v. R. R. Co., 14 A. & E. R. R. Cas., 172, and R. R. Co. v. Hopkins, 90 Ill., 323, cited by the court of appeals, which were for damages to real estate, where the premises themselves could be viewed. In the case at bar the jury could not, and did not, view the premises. They merely viewed an engine of the same type as the engine upon which the defendant in error was injured. If it were competent at all for them to obtain evidence by a view of the premises in this case, it could only have been done by affording them the same opportunity and experience as fireman upon this engine as Holloway had. Even, then, the test would not have been accurate, because Holloway was a man of experience in railroading, and this was an element for consideration also. As an illustration of the inapplicability of such cases as R. R. v. Hopkins, *supra,* the same court in the case of Vane v. Evanston, 150 Ill., p. 624, said:

"It seems clear, therefore, from the authorities, that the only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the cause. The eminent domain act declares that the jury shall, in condemnation cases, at the request of either party, go up on the land (Rev. Stat.,

Chap. 47, Sec. 9), and we have repeatedly held that the information derived by the jury from their personal view and inspection of the premises is to be considered by them, in connection with the other evidence in the case. Such was not the rule at common law, the purpose of the view being, as stated, simply to enable the jury to understand the issue, and apply the evidence. They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view. To allow that to be done would be wholly inconsistent with the principles controlling in common law trials, and introduce great uncertainty in the trial of all common law causes, where a personal view was permitted. Parties never would know upon what the jury based their finding, and the court would be in no position to control the evidence upon which it is predicated, or determine whether the verdict was based upon competent or upon the condition of incompetent and illegal matters not admissible under the issues."

In charging the jury in the case of Laflin v. Railroad Co., 33 Fed., p. 424, the court said:

"You have been permitted to view the premises in question. The object of this view was to acquaint you with the physical situation, condition and surroundings of the premises and to enable you better to understand the evidence on the trial. The knowledge which you acquire by the view may be used by you in determining the weight of conflicting testimony respecting value and damage, but no further. Your final conclusion must rest on the evidence here adduced."

The court of appeals in the syllabus prepared by it announces the doctrine that the court may not reverse a judgment because there was no evidence to support a finding of fact by the jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects in which is in issue, because the evidence derived from the inspection is not, and cannot, be presented to the appellate court for consideration. But this is not the doctrine, even in jurisdictions where it seems to be held that a view does afford

some evidence, and a contrary doctrine was announced by the Supreme Court of Massachusetts in the case of Tully v. Fitchburg Railroad, 134 Mass., p. 503. The court said:

"In many cases, and, perhaps, in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case. Parks v. Boston, 15 Pick., 198. Though the knowledge acquired by a jury from a view may be such, in some cases, as to embarrass a court in passing upon the question of the sufficiency of the evidence to warrant a verdict for the plaintiff, or upon a motion for a new trial, for the reason that the verdict is against the evidence, or that the damages are excessive, yet a judge must, in each case, determine from the circumstances of that case, whether he is so far in possession of all the material evidence as to enable him to act intelligently. The fact that the jury have had a view presents no insuperable obstacle to the granting a new trial, on the ground that the verdict is against the evidence, or the damages excessive. Harding v. Medway, 10 Met., 465; Fitchburg Railroad v. Eastern Railroad, 6 Allen, 98."

X.

The court erred in his instruction set out in the twenty-fifth assignment of error, for the reason as shown by the evidence of Dr. Runyan, that the company had provided a place to take care of all persons injured while in the employ of the defendant, and we maintain that unless plaintiff could show that the company had not furnished competent physicians and proper medical attention, that he could not incur other medical attention at the expense of the company. In other words, he knew that they were prepared to take care of him, and he must accept the medical attention there provided unless he can show some good reason for not doing it. The servant is bound to lessen the damage for which the master may be liable to him.

XI.

The court erred in that part of his charge set out in the twenty-sixth specification of error, for the reason that there was no proof to show that the plaintiff could not earn as much after the injury as he could before nor to what extent his earning capacity has been impaired.

XII.

The opinion of the court of appeals.

The court, in its opinion (R., pp. 117-126), says that the lower court committed an unquestionable error in instructing the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place, but held that the error was not prejudicial, because, as a matter of law, the company was negligent in failing to provide its engines with brakes. It then proceeded to state some exceptions to the doctrine announced in the following language:

"There may be, and probably are, circumstances under which the absence of a brake from an operating engine would not constitute want of reasonable care to provide a reasonably safe locomotive for the purposes to which its use is applied. This may be true of an engine employed in a yard for switching purposes. It might be true under any circumstances which could be shown by evidence, but in the case at bar, the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines."

These remarks show conclusively that the court, in deciding this case (1) overlooked some very important facts disclosed by the evidence and (2) based their decision upon some facts not to be found in the record.

In the first place we wish to inquire where the evidence can be found to support the statement that "the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad." We are unable to find any evidence to this effect in the record. On the contrary, it is shown affirmatively by the plaintiff himself that it was a switch engine, for on page 44 he says:

"We had orders to take Engine 3, W. & B., to Hulbert backwards, and this engine was headed west and had a headlight on the front end. She had been *used as a switch engine, and did not have a pilot on either end* and no headlight on the back end of the engine going east when backing up."

And that at the time of the injury it was being used in a dirt pit at Hulbert for getting out dirt and was only on the road on this occasion because it had been ordered sent to the company's shops at Little Rock for general repairs and had been turned back at Brinkley because of the failure of another engine in the dirt pit at Hulbert. (See testimony of plaintiff, R., p. 46; testimony of Will Barger, R., p. 57, and testimony of E. M. Roberts, R., pp. 68 and 69.)

How any other conclusion can be reached than that the evidence in this case clearly brings this engine within the exceptions stated by the court is inconceivable.

In the second place, we wish to inquire where the evidence can be found in this record to support the assumption of the court of the "absence of a brake" upon this engine. Notwithstanding the fact that the plaintiff himself testified (R., p. 21) that "it was a regular old scrap pile we were on, any way," of which fact he was fully apprised before the accident happened, yet the evidence does show affirmatively, without contradiction, that this engine was equipped with

brakes attached to the wheels of the tender, which were in first-class condition and in perfect working order at the time of the injury.

It seems clear, therefore, that the opinion of the court as to the negligence in this case is based upon facts which do not exist.

Now, let us take the conclusion of the court in its broadest significance, and that is, that the failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, conclusive evidence of a want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad, and see whether the conclusion of the court is sustained by the law and the reason of the case. In the first place, it is shown by the testimony of Roberts that this engine had been operated without any brakes by the White and Black River Railroad, another railway company of which he had been master mechanic. The presumption is, until the contrary is shown, that Roberts was a man of ordinary prudence and that the White and Black River Railroad Company conducted its business with ordinary care. But it appears that about a year before the Choctaw Company leased the White and Black River road Roberts had equipped the engine in question with brakes attached to the wheels of the tank or tender, and that at the time of the accident to Holloway these brakes were in first-class condition. Now, the court in taking judicial knowledge of facts can only take knowledge of such facts as absolutely exist. They cannot take knowledge of facts that do not exist. The photographs of the engine viewed in this case show that while the driving wheels were equipped with brakes, the tender had

no brakes whatever. The engine upon which Holloway was injured was equipped with brakes in good working order upon the wheels of the tender, but had no brakes upon the driving wheels of the engine. It is a well known fact, that for all practical purposes, the tender is but a component part of the engine, and anything that will operate to check or stop the tender will operate with the same effect upon the engine, so that, in fact, the engine in question was actually equipped with brakes. The only question that could be raised was as to whether or not the brakes were sufficient in number and were in the proper place on the engine. Now, will this court take judicial knowledge of the fact that in October, 1900, railroads in this country generally equipped their engines with brakes, both upon the driving wheels and upon the wheels of the tender. If it does, it will assume knowledge of a fact that did not, in fact, exist. If the court will not take such judicial knowledge, then will the court take judicial knowledge of the fact that it is safer or better to have them upon the driving wheels or upon the wheels of the tender. If the court takes judicial knowledge of how engines are equipped for the purpose of making quick stops and avoiding accidents, they must also take judicial knowledge of the equipment and appliances of the train as well. A certain percentage of the cars in all freight trains are equipped with air brakes. As to passenger trains it is generally true that all of the cars are equipped with brakes. This braking power upon the cars is used quite as much, and is quite as effective in stopping trains as the brakes upon the engine. The brakes on all cars are handled from the engine by the engineer just the same as the brakes upon the engine.

It is not necessary that all the cars on freight trains should be equipped with brakes, because sufficient braking power can be obtained from the brakes of a certain percentage of the cars to handle the train with safety and reasonable care. The deficiency in the braking power of an engine, if there is a deficiency, can be supplied by using a larger percentage of the braking power in the cars of the train. If the engine has no braking power, then the entire deficiency may be effectively supplied by using a sufficient number of cars equipped with brakes. So, then, it is entirely possible to safely and successfully operate a train without having a pound of braking power upon the engine. Now, if the engine in question is defective as to braking power, is the court going to assume that the company will use it in handling a train of cars without sufficient braking power on the train? Not only is this true, but for the purpose of making short and effective stops, it is preferable to use the braking power on the train to that on the engine, for the reason that wheels of the engine can be reversed and put in what is commonly known in railroad parlance as the "backward motion," which gives us not only the effect of the brakes upon the train but the full retarding power of the engine when reversed, which is more than could be gotten if the brakes on the driving wheels were used. It would not be possible to obtain this if the driving brakes were used. Repeated experiments have clearly demonstrated that the best and most effective way to make a safe and short stop is to apply the brakes to the cars and not to the wheels of the engine. The reason for that is, that the engine has only a braking power of about seventy-five per cent of the weight

of the drivers alone. This, taken when the apparatus is in perfect working order. While with the engine not equipped with driver brakes, the engine may be reversed, and full steam power applied, with which you could get one hundred per cent of the weight of the engine to act as a retarding force. Therefore, to get the best results in stopping a train consisting of engine and cars quickly, or even a light engine with brakes upon the tender, the surest stop can be made by applying the tender brakes, reversing the engine and giving sufficient steam, so that the engine will exert its full power as a retarding force. In making a quick stop, if the driver brakes are used, it frequently happens that the engine locks and the wheels slide on the rails. This is especially true if the rails are damp or frosty. This destroys the retarding effect of the engine to a great extent, as has been proven by many experiments, and by many experienced engineers it is maintained that the driving brakes should never be used in cases of this kind. So, then, to illustrate this particular case: The proper and shortest way to make an effectual stop was to apply the brakes to the tender, which was done, and reverse the engine so as to get the retarding effect of the driving wheels, which is not shown to have been done. As the evidence shows this to have been a damp night, it is likely that if the engine had been supplied with driving brakes and those brakes had been applied, the effect would have been to have caused the engine to glide along the rails, losing the entire retarding force of the drivers and the stop could not have been made as quickly with them as without.

We are justified in going outside of the record in making this argument because the opinion of the court of appeals is

based upon a supposed general custom not shown by the record.

The court of appeals, in its opinion, says it might be true "under many circumstances, which could be shown by evidence" that the failure to equip an engine with brakes would not be negligence, and adds: "There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines." If the use of this engine was consistent, under any circumstances, the presumption is that it was consistent, in this case, and it was not incumbent on defendant to explain anything, until plaintiff had overcome this presumption by positive proof to the contrary, which, we submit, was not done.

St. L., I. M. & So. Ry. v. Gaines, 46 Ark., 555.

Patton v. T. & P. Ry. Co., 179 U. S., 658.

Witnesses for plaintiff testified that this engine, equipped with brakes on both the drivers and the tender, and running at the rate of six to eight miles an hour, would run 60 to 90 feet before stopping, after the brakes were applied. (See testimony of Barger, Tr., p. 83; Farrell, Tr., p. 84.)

Witnesses for defendant testified (See testimony of Roberts, Tr., p. 67; Welch, Tr., p. 70) that running at the same rate of speed, this engine, equipped as it was, could have been stopped within 35 to 50 feet. To have done this, however, the engine should have been reversed, as explained above, which it does not appear was done. If the testimony of defendant's witnesses were true, and they were entitled to as much credence as witnesses for plaintiff, then this was a

better engine than plaintiff contends he should have had. Certainly, this was a question which should have been submitted to the jury.

This brief could be extended to an unreasonable length by a consideration of other similar questions in connection with the equipment and handling of trains and engines, but the foregoing, we think, is sufficient to demonstrate clearly that the court was not warranted, either by law or the reason of the case, in its conclusion that the company was guilty of negligence *per se* in respect to this engine. The court has, indeed, entered upon a wide field and its opinion is a dangerous precedent, and if the principles announced are sustained by this court it will unquestionably prove a source of annoyance and embarrassment to the courts and set at naught long and well established principles of the law of negligence relating to master and servant.

Logging Co. v. Schneider, 74 Fed., 200.

The court seems to have laid some stress upon the statement of the plaintiff that he had never worked upon an engine before which was not properly equipped with brakes. This information was elicited by a leading question from plaintiff's counsel and proves nothing. It is a little remarkable that he should know how all other engines upon which he had worked were equipped and know nothing about this particular engine. In his original complaint, he alleged that this engine had brakes upon the driving wheels, but that they were in a defective condition, and in spite of the admission in the answer that there were no brakes upon the driving wheels of the engine, he still swore at the trial that immediately after the accident he examined the engine and it had

the braking apparatus attached, but the shoes were defective and would not clasp. His statement is very general, is a legal conclusion, does not show how many engines he had worked upon, whether they traveled over mountains or upon level ground, nor to what purpose they were put, and is, in any event, insufficient to establish, as a matter of law, negligence on the part of the defendant in respect to this engine.

Replying to the conclusion of the court that it was negligence *per se* to operate an engine equipped as to brakes as this one was upon its road in the usual service of moving loaded trains, we answer that this accident did not happen while such engine was being so used.

The court having reached the conclusion, as a matter of law, that the company had failed to exercise ordinary and reasonable care in respect to this engine, also reached the conclusion, as a matter of law, that the accident was the natural and probable consequence of such negligence. But we submit that this was a question which should also have gone to the jury. This is especially true in this case, because Engineer Davis testified, in response to a question asked by plaintiff's counsel, as follows (R., p. 15): "Q. Is the road fenced at the point along where the accident occurred? A. Yes, I think it was." On cross examination, he testified (R., p. 76): "Q. Are you positive that the track was fenced at the point where the accident occurred? A. I had passed there many times before and do not remember of seeing any place along there that was not fenced." This evidence is uncontradicted, and a consideration of the same by the jury was important from two aspects:

First. The company having fenced its right of way for the purpose of keeping stock off of its tracks, we submit that it was not proper for the court to say, as a matter of law, that the collision with this horse was the natural and probable consequence, but that it was a question for the jury.

Second. The court, in its opinion, says that "the purpose of the exercise of this care is to prevent accidents and collisions." Does the court mean to say that the company is limited to the adoption of any particular method or way of preventing "accidents and collisions?" If, instead of equipping this engine with brakes in the manner which the court held that it should have done for the purpose of preventing collisions, it saw fit to fence its road and in that way prevent the happening of the very thing which the court says the brake was also designed to prevent, then we ask was it proper for the court to say, as a matter of law, that the company had not exercised ordinary care to prevent this collision, or was it proper for the court to submit this question to the jury as a question of fact to be determined by them. We submit that the latter was the only proper course.

These two important questions of fact should have been submitted, under proper instructions, to the jury. In view of these two important questions of fact, it is not easy to understand how the circuit court of appeals could hold that the "patent and unquestionable" error of the circuit court in repeatedly instructing the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place was error without prejudice.

The court, in its opinion, says that the servant is not required to search for latent defects or hidden dangers, but it is his duty to exercise reasonable care to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working. Just how it can properly be left to the jury to say in this case whether or not the plaintiff has knowledge of the fact that there was no brakes upon the engine is hard to understand. The plaintiff was a skilled and experienced railroad man. Every witness, without exception, testified that the brakes occupy a most conspicuous position. The photographs in evidence show this. If the lack of brakes was a defect, the defect was neither latent nor hidden. Therefore, no duty rested upon the company with respect to pointing out this defect. The plaintiff himself says he could have seen it if he had looked. The law says he must look, and if he does not choose to look the law will say that he had notice.

In the case of Stewart v. Seaboard Air Line, 41 S. E., p. 981, the court said:

"If there was anything visibly wrong about the brakes on the day in question, it could have been discovered by the plaintiff as well as by the defendant, and if both the defendant and the plaintiff had equal opportunities of discovering this patent defect in the appliances on the day the accident occurred, then the defendant would not be liable for an injury resulting therefrom" (citing cases).

See also:

I. & G. N. R. R. v. Story, 62 S. W., 130.

Detroit Crude Oil Co. v. Grable, 94 Fed., 80.

Brooks v. Northern Pacific Ry. Co., 47 Fed., 687.

But let us consider the case from the standpoint of the more liberal rule adopted by the court that he was only

required to "exercise reasonable diligence to observe and be cognizant of all obvious defects in the machinery and appliances with which he was working." Clearly, if he had not exercised reasonable diligence to observe and be cognizant of all obvious defects, then he would be guilty of negligence, and yet the trial court refused to submit any question of contributory negligence to the jury. Referring to the evidence of the plaintiff to which we have already called the court's attention, we submit that it demonstrates clearly that the plaintiff not only did not exercise reasonable care, but no care whatever, with reference to observing. Plaintiff continually took the position in his evidence that it was no business of his to know anything about the machinery at all. If his evidence, in connection with the evidence of the other witnesses, did not warrant the court in saying, as a mater of law, that he had knowledge of the defect, it was certainly sufficient to require the question of whether he had used the ordinary care required of him in this respect to be submitted to the jury. In addition to this, the plaintiff knew and had been furnished with a book of the rules of the company (R., pp. 49, 50 and 51) and seemed to be familiar with the same (R., p. 29). Rule 200 (R., p. 92) is as follows:

"Every person accepting a position with this company does so with a full knowledge of the dangers incident to the operating of railroads and is required to exercise great care in the performance of said duty to prevent accident to himself and others, and to see that the machinery or tools which he is to use are in safe condition to perform the services required, and to report defects as per Rule 203."

This rule was reasonable. No question of fact is presented as to whether the plaintiff even tried to comply with it, for we find his evidence full of such expressions as

"perfectly plain" (R., p. 38), "I never inspected it at all" (R., p. 32), "I have got no business knowing any machinery at all" (R., p. 37). In fact, he seems to take great satisfaction in the fact that he closed his eyes completely to what could have been seen by the most casual look. He was guilty of negligence as a matter of law.

L. & N. R. R. v. Pearson, 97 Ala., 218, 219.

We respectfully submit that a careful reading of the record in this case will establish the fact that the plaintiff in error has not had a fair trial.

EDWARD B. PEIRCE,

Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.....*Plaintiff in Error.*

v. No. 68

WILL HOLLOWAY.... .....*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Defendant in Error.

JOHN W. BLACKWOOD,
M. HOUSE,
J. W. HOUSE,
Attorneys for Defendant in Error.

ARKANSAS DEMOCRAT CO. LITTLE ROCK.

IN THE

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.....*Plaintiff in Error.*

v. **No. 352**

WILL HOLLOWAY.... .....*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Defendant in Error.

Learned counsel for the plaintiff in error has not given a full statement of the case, nor has he abstracted all the evidence introduced to sustain the issues of the

defendant in error, hereinafter called the plaintiff, hence we make an additional statement of the case and abstract of the evidence.

While the plaintiff charged various grounds of negligence only one was finally submitted to the jury, hence only that cause will be considered here. The plaintiff charged that he had received certain injuries by reason of the negligence of the defendant, as follows:

"That on the 27th of October, 1900, he was employed by the defendant company as a fireman; that on the 29th of October, 1900, he entered upon his duties as such fireman, and began work for the defendant company as such, and that on the 31st of October, 1900, he was engaged in his duties as such fireman, and that on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant as an engineer, were at Brinkley, Monroe County, Arkansas, and while there the said W. H. Davis, and the plaintiff received orders from their superior officer, the chief night dispatcher or trainmaster of the defendant company, at Little Rock, Arkansas, who had exclusive control of the movement of all trains and engines, at about 11 o'clock at night, directing them to back up switch engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about 60 miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of

men were at work repairing the road bed, was ditched and disabled; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so the headlight would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but this request was refused, and they were directed by said chief night dispatcher or train master, at Little Rock, to back said engine down to Hulbert, a distance of about 60 miles in the night time as aforsaid, when it was dark; that in obedience to such orders and directions, the said Davis, as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about 13 miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the the tank or tender and the engine and was thereby seriously and permanently injured, as set out in the complaint (R. 4); that the said negligence of the defendant company consists in this, to-wit:

"That the brakes of the engine were out of repair and could not be worked or used at the time of the in-

jury aforesaid, that is to say when the air was applied to the brakes, those on the tank or tender in front of the engine. that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender, while the brakes on the engine were not in a condition to work, the same being out of repair, and the shoes could not be made to clasp the wheels and thereby stop the engine. In fact there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied the air to the brakes so as to stop the engine and tank or tender as soon as possible. The brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels. That the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine. Thus the engine was forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender closer together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender, he was caught between the same and thereby injured as

aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes." (R. 10, 11 and 12).

To this complaint the defendant filed an answer in which it denied negligence upon its part and charged contributory negligence upon the part of the plaintiff, and in answer to the specific charge of negligence above set forth, it said:

"Denies that the brakes of the engine were out of repair and could not be worked or used at the time of the injury aforesaid as alleged in plaintiff's complaint, and in respect to said brakes this defendant alleges that said engine had no brakes whatever on the engine," (R. 14.)

The plaintiff, Will Holloway, testified as follows:

On the 30th of October, 1900, I was locomotive fireman for the defendant. I started to work for the defendant as such fireman on the 29th of October, 1900. I left Little Rock and stopped at Brinkley, which is about sixty miles east of Little Rock. We left Little Rock at 1 o'clock on the night of the 29th; we went from Brinkley to Hulbert which is about sixty miles east of Brinkley. Hulbert is this side of Memphis about nine miles. We left Hulbert about 1 o'clock in the afternoon for Brinkley with engine W. & B. 3. We did not bring the engine back that we carried down; we came back on engine W. & B. 3. I had never seen

this engine before. We were ordered to Brinkley. There was no train attached to the engine, just the engine and tank. Davis was the engineer. When we reached Brinkley we had orders to back up from Brinkley to Hulbert. We received these orders about 10 o'clock at night. When we reached Brinkley we were told that we had to back up to Hulbert. We requested that the engine should be turned but the request was refused. The engine we were instructed to back down to Hulbert was the same upon which we came from Hulbert to Brinkley. We started to Hulbert on engine W. & B. 3. We went some twelve or fourteen miles at a speed of some seven or eight miles an hour. When we had gone this distance, I was putting coal in the fire box and the engineer, Davis, was looking out and he hollooed out to me to look out. I shut the door and started to get out. I stepped out backwards and put my foot on the step to catch myself the way the engine was going to keep from falling. As I stepped back, he applied the air, threw the air in the emergency, gave her all the power she had to stop her, and in an instant, she struck the horse. The tank and tender all bungled up together and caught me as I went to get out. I hallooed to him to release the air, that I was caught and he did so, which caused the tank to separate. I then fell on my knees and left the engine. The first knowledge I had of any obstruction was when Davis hallooed "look out, look out!" After

he said this I think the car ran some 50 or 75 feet before it struck the horse. The effect of the collission was that the chafing irons, that is, the two irons that play between the tank and engine were broken into four pieces and judging from the way the engine got back over the tank, the goose neck was bound to have bent to let it over. The end of the engine from the end of the tank is from 20 to 20½ inches. This would be the distance between the ends, they are coupled with this goose neck; this goose neck enters into what you call the brass casting. I was caught between the tank and engine while attempting to get out and was injured as described in the complaint. (Tr. 24-28).

Witness continuing said:

I did not know that the engine had no brakes when we were ordered to back it to Hulbert. When the engineer applied his air to the brakes and it did not stop, I got off and told him that none of the shoes of the engine ever clasped the wheel. I did not know that the engine had no brakes at all until I read it in the answer to my complaint. (R. 28-30).

We received this engine from the traveling engineer, the engineer in charge. He said "that the engine was coming to the shop for repairs; that she had worn out her brasses and pony trucks ahead and he used car brasses there for a make-shift". The hose on the left side from the tank to the injector was bursted

and I wrapped that with some old bagging, and her blower pipe, the valve was off that entirely and it filled the cab with steam and water. I had a plug in there and kept it wrapped with waste. That was on the tank. The defect that I spoke of in a certain wheel was the pony trucks which ran ahead of the engine. The engineer said he put some car brasses in there and she would do until we got to the shop. I objected to going back, backing the engine. I said I did not want to do it and asked the engineer to ask the train master to let us turn the engine; but he declined to do it. After taking the matter into consideration, Mr. Davis, the engineer, and I had a talk in regard to turning the engine; and it being a case of emergency, I considered that if they wanted me to back the engine up they would use every precaution, give me a clear track, and thinking too I could make the trip without any very great danger to myself, I consented to go, they being the master and I being the servant. I knew it was more dangerous to back up the engine than to go with the engine in front; but not so much so that it would be at all obvious. (R. 34-35).

Seven miles an hour is not fast. Running at this speed the engine is supposed to be under control with proper appliances. If the engine had been properly equipped with brakes it could have been stopped within two lengths of itself easily. I could not tell you how far an engine equipped like this without any brakes

would go. In returning on this engine from Hulbert to brinkley I could not tell whether she had brakes on or not. I have all I can do when I fire a locomotive to attend to my own business without looking after the engineer's business. I had to look after my coal, water and lights. My business does not require me to look after the machinery, I do not remember any grades between Hulbert and Brinkley that amounted to anything. (R. 36-37).

The engine would not run ahead of the tender where it is coupled up with safety chains and goose neck. There is not a play of fifteen to twenty inches between the engine and tank. It is only about two and one-half to three inches at the outside. There is a gangway between the two of twenty and one-half inches from the engine to the tank. The gangway is an opening. The air applied to the tank, with the coal and water on her, nothing but a light train would be sufficient to hold her perfectly level; it would not produce a jumping sensation. This was a ten wheel engine; she had three drivers on each side; the brakes are located between the two drivers on each side. If a man is on the ground he can see whether the brakes are there or not. If he is walking up to the engine to get on it and he looks, he can see the brakes. The weight of the engine is so much greater than that of the tank that the tank would drag along perfectly still

when the air is applied and it would not be abrupt. (R. 38).

The weather was not thick cloudy but there were clouds floating over; but it never got thick cloudy until four o'clock in the morning after the accident. We went back from Brinkley to Hulbert on account of engine 33 being disabled in the pit and we started back with this engine to use it in the pit. The hose of which I spoke was under the tank; it was leaking and I wrapped it with some packing. To do this I had to get under the tank, under the front trucks of the tank. When we started back to Hulbert the traveling engineer remarked to us that they had put a car box brass in the pony trucks, that was all he had to put in it; that we would have to watch it and if it ran hot we would have to stop and oil and cool it, but it did not run hot and we did not stop to cool it. When we had the collision the wheels of the tank ran off the rail something like twenty or thirty inches. It veered a little to the south as it left the track. I went out on the engineer's side; he sits on the right hand side (R. 46-47).

On the night of the injury an engineer standing on the cab where we were and where it was our duty to be, our range of vision would reach the ground in front of us from 60 to 70 feet. In other words, we could see the ground a distance of 60 feet from where we were in the

cab. If a horse was on the track we could have seen the bulk even sooner than that. In my opinion, we could have seen the horse from 60 to 75 feet ahead of us on the night of the injury. I noticed the engine that night after the injury and the shoes did not clasp the wheels. My attention was not called that night after the injury to the breaks more than just merely passing by; don't remember whether there were shoes on the brakes or not. It seems to me there were; but I may be mistakened about that. When the air was turned on the shoes did not clasp the wheels. If the engine had been properly equipped with brakes with the air turned on, the shoes would have clasped the wheels. In fixing the pipe or hose above referred to, it did not bring me in touch with the brakes under the engine. I was behind the fire box at the end of the engine, seated with my back to the engine and my face to the back of the tender working on the hose in front of me. Unless my attention had been called especially to the brakes I would not have seen them. At the time I left Brinkley I supposed the brakes were in proper working order. I never worked on an engine before that was not properly equipped with brakes. If there had been brakes on the engine, when the air was turned on, the effect would have been to hold the tank and engine the same distance apart and keep them perfectly steady. An engine and tank can be stopped a great deal quicker where the brakes are in proper order and on both the

engine and tank than it could where the brakes could only be applied to the tank. The engine is several times heavier than the tank. The effect of turning on the brakes on both the engine and tank supplied with brakes, would be to hold them the same distance apart; and they could be stopped quicker with proper appliances than they could if they had no brakes upon them. The weight of the engine along with the air applied to the wheels would stop it almost instantly. After I got onto engine No. 3 W. & B., I had no occasion to do any work where the apparatus of the brakes was constructed or made. I had nothing to do about the engine which would have called my attention to the brakes whether they were in condition or out of condition. I was only out of my engine once from Hulbert to Brinkley and that was the time I got off to wrap the hose and that was where I could not see the brakes (R. 54 55).

In running the engine without brakes and running it in front of the engine as we did in coming from Hulbert to Brinkley, there was no occasion for stopping the engine in any way for me to notice that there were no brakes on the engine or that they were out of repair. We had no occasion to use any brakes in case of emergency or anything of the kind. In coming into a station, or making a stop for a water tank, we shut off and rolled in slowly. There was no occasion for us to put on the brakes with any force at all; we had nothing

but the engine and tank. There was no occasion for us to put on the brakes so as to call our attention to the fact that the tank was dragging. The weight of the engine is so much greater than that of the tank that it would drag it along running at anything like speed (R. 61-62).

The witnesses who testified that the brakes could be seen from the position of the fireman in the cab were mistaken. Since such testimony was given yesterday I have made a personal examination and find that while standing in the cab where the fireman is required to be, I can not see the brakes. There is a window directly in front of a man standing in the cab; then there is a plank supposed to be anywhere from 28 to 30 inches wide; that comes right along by each side of the boiler and back through the cab. This plank runs to the end of the boiler and is placed over the wheels so that the brakes can not be seen from where the fireman is required to be. You cannot see the brakes at all. I have examined an engine precisely like the one on wnich the injury happened. The brakes are situated immediately under the planks so that the view from the cab is obstructed. I had a conversation with Davis, the engineer, sometime after the injury happened in the office of Mr. J. W. House. He then said that when he first noticed the object on the track at the time of the injury, it was somewhere from 40 to 60 feet ahead; that he realized it was an object

of some kind or obstruction and applied the air, and at the same time hallooed to me to give me an opportunity to get out (R. 85-86-87).

Will Barger, in behalf of plaintiff, testified as follows:

I am a fireman, and was in the employ of the defendant company about the 30th of October last. I was at Hulbert about that time. I know engine No. 3, W. & B. I worked on it as fireman. I knew this engine before the injury happened to the plaintiff. She had air on her tank, but none on her drivers. I knew it was in this condition a little while before the plaintiff was injured. I worked on that engine in the pit at Hulbert for several weeks as brakesman. As far as I can remember, I do not think there was any apparatus for the brakes, but there might have been without my seeing them; could not say positively, but I don't think there was (R. 56-57).

I have been brakesman on the railroad for about seven years. If engine and tank No. 3, W. & B., had been properly equipped with brakes it could have been stopped within about ninety feet after seeing an object before it. If there were no brakes on the engine it would go further, of course; it would go about 100 to 125 feet. If both had been supplied with brakes it ought to have been stopped within sixty to seventy-five feet (R. 82-84).

J. W. House testified:

The engineer, Davis, came to my office to advise with me about bringing suit against the company. In several conversations I had with him, in order to determine the question of the liability of the company to him, he said he saw some object; that at first he thought it was a shadow, but that he immediately saw it was some obstruction on the railway and he applied the brakes at once. My recollection is that he said it was anywhere from forty to sixty feet in front of the engine when he first observed it (R. 92).

The witness, Farrell, testified as follows:

I am a fireman for the defendant company and have been for 10 or 11 months. From my experience and observation I would say the engine upon which Holloway was injured, No. 3 W. & B., with the engine and tank properly equipped with brakes and running at a speed of 7 or 8 miles an hour could be stopped within 60 to 75 feet. If there was no brakes on the engine, it would run from 40 to 50 feet further. (R. 83-84).

The defendant introduced the following testimony, E. M. Roberts testifying as follows:

On the 30th day of October, the day of the accident, I was foreman locomotive of car department at Brinkley for the defendant company. The engineer

and the plaintiff came into Brinkley on an engine, No. 3 W. & B. I know the engine; she has only tank brakes on her, but there was no brakes at all on her drivers of any kind; never have been since I have been in charge of the engine, two years last February. There were no brakes on the engine on the date of the accident. The engine has three driving wheels on each side. If brakes had been on the engine they would have been on two of the driving wheels on each side, on the two back wheels. (R. 64-65).

If the engine was traveling six or seven miles an hour under perfect control and an animal should be discovered on the track from 50 to 75 feet in front of the engine, she could have been stopped in from 35 to 40 feet at the outside. (R. 64-65.)

They were ordered to go back to Hulbert after they arrived at Brinkley. I knew the engine was going backwards when it did go; they were instructed to run it backwards. They had orders to back up from Brinkley. I had no authority to change the order without some authority from headquarters. They had to back that engine up in order for her to be headed right to work in the pit when they reached Hulbert. The engineer wanted to work the engine in front after they reached Hulbert so the engineer could see right ahead of him when he was working loading or handling these gravel cars. That is, they wanted the engine

headed the way she then was when they reached Hulbert. (R. 68).

C. H. Welsch testified:

On the date of the accident I was master mechanic of the defendant company. I was acquainted with the engine the plaintiff was on. If he was riding on the engine and there were no brakes on the driving wheels of the engine there would be nothing about the riding of the engine which would tend to show him that part of it. If the air was applied to the tank and no brakes were on the engine there would be a little difference in the distance in which it would stop. I don't think there would be any bumping or running along in front; don't think there would be any difference about that part of it. (R. 70).

J. T. Wells testified as follows:

I was train dispatcher for the defendant Company on the night the injury is alleged to have occurred to Holloway. I remember the night the engine went off of the track with Engineer Davis and Fireman Holloway. I was the dispatcher on duty that night and had charge of the trains. The engine they were on had left Hulbert at 1:05 p. m. to go to Little Rock for repairs. While they were coming from Hulbert to Brinkley an engine broke down at Hulbert, and we stopped this engine at Brinkley and this engine was ordered back to Hulbert to take the place of the disabled one. The

telegram which I sent and under which they acted is as follows:

"No. 83 C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, Engines 31 and 17, and will back up carefully."

This is the last order I gave them. (R. 71-72).

By consent of the parties the jury were permitted to view the locomotive or one exactly like the locomotive upon which the injury happened, under proper instructions from the court (Record 92-93). And photographs of the engine are made a part of the record, showing both sides of the engine. (R. 95-96).

The defendant read the deposition of W. H. Davis, the engineer, and by examination of his testimony and the correspondence had with the plaintiff's counsel it will be seen that while he was writing that his evidence would be of material advantage to the plaintiff, at the same time he was trying to get back his job with the railroad company, and sending the letters of the plaintiff's counsel to the trainmaster of the defendant company. In other words, his testimony shows that he was acting with duplicity and dishonesty. For deposition of W. H. Davis, see Record 74-79; and for Davis' letters to counsel for plaintiff, constituting Exhibits "A," "B" and "C" to above deposition, see

Record 127-128; and for copies of letters of plaintiff's counsel to Davis, see Record 89-90-91.

ARGUMENT.

We have given an abstract of the plaintiff's testimony and a partial abstract of the defendant's testimony, as far as we deem it necessary, to show that there was a conflict in every material issue except as to one, and that is, as to the defective condition of the brakes on the engine; and as to this, the defendant admits there were no brakes at all. And to show further that there is not an issue involved in this case which has not been decided so often by the courts of last resort that they have become elementary; to establish this, it is only necessary to call the attention of the court to the testimony and the law given by the court. But it is contended by learned counsel for the defendant that there is no specific charge of negligence charged in the complaint. If this be true, the English language is at fault. We are unable to see how negligence can be more specifically alleged and proven. It is alleged that the engine was a regular road engine, that is, a large engine with three driving wheels on each side. This is not denied. It is charged that the brakes on the engine were out of repair, or that there were no brakes on the engine. This is not denied; but it is admitted that the engine was not supplied with brakes at all. It is charged that the engineer

and the plaintiff, a fireman, were directed by the chief night dispatcher or trainmaster to run the engine, in the night time, backward from Brinkley to Hulbert, a distance of about sixty miles. It is admitted that they ran the engine backwards in the night time, but denies that they were so ordered. But it is proved by the trainmaster that such order was given. Here is the order:

"No. 83, C. & E. 1st and 2nd No. 9, Edmonson; C. & E. W. & B. Eng. 3, Brinkley. W. & B. Eng. 3 will run special from Brinkley to Hulbert, and has right of track to Summit against 1st and 2nd No. 9, engines 31 and 17, and will back up carefully" (R. 72).

And it is shown by defendant's witnesses that no one had a right to change this order except the train dispatcher. It is shown by defendant's evidence that it was necesssary to run the engine backwards so as to have the engine in front, that is, fronting west, when it reached the dirt pit at Hulbert as there was no turn table there to change it. It is further shown by defendant's evidence that the engine was ordered there as a matter of necessity to take the place of an engine which had been disabled.

It is further alleged by the plaintiff that by reason of the fact that the brakes were out of repair or that by reason of there being no brakes at all when the air was applied to the brakes the effect was to stop the

tank or tender in front of the engine, and that it had no effect whatever on the engine; and that when the tank in front of the engine collided with the horse, with the brakes applied, the effect was to force the engine with all its weight and momentum upon or against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank; and thereby bringing the ends of the tank and engine closer together; and as the plaintiff was attempting to escape between the engine and tank, he was caught between the same, and injured as alleged. Here is a specific act of negligence charged, and the proof fully sustains the charge. The plaintiff testified that when the engineer, Davis, discovered the horse upon the track, he hallooed "Look out; look out!" and immediately applied the air, threw the air into the emergency and gave her all the power he had to stop her, and that they ran some 50 to 75 feet after this before they struck the horse. It is true that the engineer testified that he did not see the horse; but in this it is shown by two witnesses that he had previously stated that he saw an object some 50 or 60 feet in front of the engine before he struck it; and the correspondence between Davis and the attorney for the plaintiff shows that while he was pretending that he was friendly to the plaintiff and that his testimony would be important to him, at the same time he was sending the letters of the said attorney to the superintendent of the railroad

with the view of trying to be reinstated. In other words, his conduct shows him to be unworthy of belief. The testimony further shows that if the engine had been properly equipped with brakes that it could have been stopped within from 40 to 75 feet. Barger testified that with proper brakes, with the engine running seven or eight miles an hour, it could be stopped at about 75 feet; but that without brakes on the engine it would go 125 feet before it could be stopped. Farrell testified that running seven or eight miles an hour with the engine properly equipped with brakes it could be stopped at from 60 to 75 feet; but if there were no brakes on the engine it would run 40 or 50 feet further before it could be stopped. In other words, the proof shows that if the engine had been properly equipped with brakes, that the engineer, after seeing the horse on the track, could have stopped the engine before there was a collision and thereby prevented the injury; and the instructions of the court specifically directed the attention of the jury to this issue (R. 18).

In other words the jury was told by the court, "that if the accident would not have been prevented, even if there had been suitable brakes on the engine, then the plaintiff cannot recover" (R. 102).

Holloway testified that although he had been brakeing on railroads for several years this was the first

engine that he had ever been on which did not have brakes. But this was unnecessary, to run a heavy engine as this was shown to have been, without brakes is negligence *per se*. The courts take knowledge of any fact which is known to everyone.

Brown vs. Piper, 91 U. S., 37.
12 Am. & Eng. Ency. of Law, 197.
Ry. vs. Warner, 108 Ill., 538.
Smith vs. Potter, 46 Mich. 258.
89 Am. Decisions, 663.
49 Am. R., 201.

Even if negligence was not specifically alleged and the defendant goes to trial and evidence is introduced without objection showing negligence, the complaint will be considered amended so as to conform to the testimony.

Gainus vs. Cannon, 42 Ark., 503,
Ry. vs. Triplett, 54 Ark., 289.
Texarkana Gas Co vs. Orr, 59 Ark., 215
Dorris vs. Grace, 24 Ark., 326.
Healey vs. Conner, 40 Ark., 352.
Ry. vs. Harper, 44 Ark., 524.
Davis vs. Goodman, 62 Ark., 262.
Hanks vs. Harris, 29 Ark., 323.

When a given state of facts are proven from which negligence may be inferred, it makes a *prima facia* case of negligence; and it was then incumbent on the defendant to show that operating the engine without brakes was not negligence. The testimony shows that had the engine been properly supplied with brakes and applied as the proof shows, it could have been stopped before it collided with the horse, and the injury thereby avoided.

Peirce vs. Kile, 80 F. R., 867.

And besides it is specifically charged in the complaint that it was negligence to operate an engine with defective brakes or without brakes at all and this is not denied, hence so far as this is concerned it stands confessed that to operate an engine without brakes is negligence, and no proof as to that was necessary.

II.

Learned counsel also contend that the plaintiff was chargeable with knowledge that there were no brakes on the engine. The evidence on this point was conflicting, and it was for the jury to determine this issue. They did determine it in favor of the plaintiff and their finding is conclusive. Holloway says that he did not know there were no brakes on the engine. As an evidence that he did not know of this it is shown in his original complaint that he only charged

that the brakes on the engine were defective, and when air was applied, that the brake shoes would not clasp the wheels, and it was not charged that there were no brakes until the defendant filed its answer in which it denied that the brakes were defective; but stated that the engine was not supplied with brakes at all. This was the first that he knew of their being no brakes on the engine. He testified he had neven seen the engine until about 1 o'clock of the day before the injury occured at night; that the engine was turned over to him and the engineer at Hulbert by the traveling engineer to be carried to Little Rock for repairs; and that the traveling engineer said that some of the brasses were out of the pony trucks or small wheels in front of the engine; that he boarded the engine at Hulbert and had no occasion to get off of it but once between there and Brinkley, a distance of about 60 miles, and then he got out to bind a hose under the tank and in doing that his back was toward the engine; and besides, his view of the engine was obstructed by the fire box. Hence at no time was he in a position to have seen whether the engine was supplied with brakes or not. He testifies that the road from Hulbert to Brinkley was practically level and, as they were running light, it was not necessary to apply the brakes; and that from his position as fireman in the cab he could not see whether there were brakes on the engine or not from the fact that there was a wide foot board extending from under

the cab to the front end of the engine on each side which so obstructs the view that the brakes could not be seen. This was contradicted by the defendant's witnesses who testified that the brakes could be easily seen from his position as fireman. Holloway testified after defendant's witnesses had closed that the brakes could not be seen from the cab; that he had made a personal investigation and that the brakes or their absence could not be seen, thereupon, by consent the jury were permitted, under proper instructions to go and view an engine which was admitted to be of the same make and build as the one upon which the injury occured; and the jury found from the evidence under the instructions of the court that the plaintiff did not know and that in the exercise of ordinary care he ought not to have known that there were no brakes on the engine; and the court's charge upon this subject was more favorable to the defendant than it was entitled to (R. 17-18).

Swift vs. Ry., 45 Am. & Eng. Ry. Cases, 180.
Ry. vs. Fox, 39 Am. & Eng. Ry. Cases, 318.
Houston Ry. vs. O'Hare, 64 Tex., 600.
Ry. vs. McDade, 135 U. S., 554.

The burden of proof is on the master to show that the servant knew of the defects or want of brakes, *11 Am. & Eng. Ry. Cases, (N. S.), Note 489.*

Furthermore, it would be remarkable indeed to set aside the finding of the jury on this point, when the

jury by the consent of the parties was permitted to go and view an engine which was admitted to be precisely like the one upon which the injury occured and thereby determine whether plaintiff's or defendant's witnesses were mistaken as to whether the absence of the brakes was obvious to a fireman when in the exercise of ordinary care. When the jury is permitted to view the subject-matter in controversy, their finding must be conclusive.

McReynolds vs. Ry., 14 Am. & En. Ry. Cases, 174.

Ry. vs. Walker, 20 Am. & Eng. Ry. Cases, 398.

Chicago Ry. Co. vs. Hopkins, 90 Ill., 323.

The court's attention has been called to *Fordyce vs. Edwards, 60 Ark., 441.* By reference to the court's charge, it will be seen that the criticism made in that case is fully covered by the court's charge (R. 17-18).

Indeed, the instructions of the court on this issue were much more favorable to the defendant than they should have been. The testimony both for the plaintiff and the defendant shows that the plaintiff in going upon the engine from Brinkley to Hulbert was acting under the direct command of the superintendent of the defendant company in a case of emergency. It is

shown that although the engine had been ordered to Little Rock for repairs, yet it was ordered back from Brinkley to take the place of an engine that had been disabled at the dirt pit at Hulbert. In such cases, it is held by the Supreme Court of the United States, by this court and the text writers, that although the servant may know of the defects, yet if the danger was not so obviously hazardous that a reasonably prudent man would not have taken the risk, the master is liable if injury occurs by reason of such defects.

Miller vs. Union Pac. Ry., 12 F. R., 600.
McDermott vs. Ry., 87 Mo., 285.
S. C. 28 Am. & Eng. Ry. Cases, 528.
12 Am. & Eng. Ry. Cases (N. S.), 672.
20 Am. & Eng. Ry. Cases, (N. S.), 278.
Ry. vs. Egeland, 56 F. R., 200.
Ry. vs. Egeland, 163 U. S., 93.
Ry. vs. Rickman, 65 Ark , 138.
Ry. vs. Barry, 58 Ark., 198.
Felton vs. Harbinson, 104 F. R., 737.

If the master knowingly furnished the servant with defective machinery and the servant uses such machinery under the orders of the master and is injured, the master is liable unless the machinery is so obviously dangerous that a reasonably careful man would not undertake the work.

Ry. vs. Finlayson, 18 Am. & Eng. Ry. Cases, 68.

Stephens vs. Ry., 38 Am. & Eng. Ry. Cases, 110.

Ry. vs. Everett, 152, U. S. 107.

Under the circumstances of this case, even if the plaintiff had known of the defective condition of the brakes or that there were no brakes at all, he was not guilty of contributory negligence. He and the engineer were ordered to back the engine to Hulbert. It was a case of emergency. The engine at Hulbert, where the railway company was removing gravel to repair the road, had become disabled. It was necessary to back this engine to take the place of the disabled engine. For the plaintiff to have disobeyed this order would have put the defendant at great inconvenience and expense.

Ry. vs. Young, 49 F. R., 724.

Ry. vs. Yeargin, 109 F. R., 442.

Ry. vs. Moses, 123, U. S., 710.

Kane vs. Ry., 128 U. S., 91.

Patterson vs. Ry., 18 Am. R., 412.

Ford vs. Ry., 14 Am. R., 598.

Francis vs. Ry., 127 Mo., 658.

S. C. 28, S. W. 842.

Sherman & Redfield on Neg. (5th Ed.) Sec. 211.

But we did not care to invoke this doctrine, and hence we did not ask it, although under the proof we might have done so.

III.

It is also argued by learned counsel that the defects as to the brakes or the absence of the brakes was not the proximate cause of the injury. They say, "undoubtedly the proximate cause of this injury was the presence of the horse upon the track, without which the collision and accident could never have happened." It may be true that the injury would not have happened if the collision had not occurred. But it is likewise true that the injury would not have happened, although there was a collision with the horse, if the engine had been properly equipped with brakes.

Therefore, the absence of the brakes from the engine was the proximate cause of the injury, and the jury so found. The testimony of both the plaintiff and defendant shows that if the engine had been properly equipped with brakes, it could and would have been stopped before it collided with the horse and thereby the injury would have been prevented; and the instruction of the court, as we have before shown, was specific and certain on this point (R. 18). This is a novel proposition, indeed. With the same propriety it might be said that if the conductor and crew of a freight train were directed to take such train from the

union depot in the city of St. Louis to some distant point in the night time and, just before its departure, the master intentionally causes all the brakeing apparatus to be removed, without the knowledge of anyone connected with the train, the conductor and crew start out in obedience to orders; after running a short distance the engineer sees a horse on the track in ample time to stop the train; he blows the whistle, the animal still remains on the track, he still has time to stop the train, he attempts to turn on the brakes but finds none there. The train moves on, strikes the horse, the train is derailed and the engineer and entire crew are killed or more or less injured; still the master would not be liable, because, forsooth, the collision with the horse was the proximate cause. It is only necessary to state the proposition to show its absurdity.

The fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. The master's wrong combinding with some other cause and both operating proximately at the same time in causing an injury, the master is liable.

16 Am. & Eng. Enc. of Law (O. S.), 440.
2 Thompson on Neg., 1085, Sec. 3.
Bishop on Non-Contract Law, 39-450-452.
Sherman & Redfield on Neg., 31.
Eaton vs. Railway, 11 Allen (Mass.), 500.

S. C. 87, Am. Dec., 730.
Aetna Ins. Co. vs. Boon, 95 U. S., 117.
Cartersville vs. Cook, 129 Ill., 152.
S. C. 50 Am. R., 352.
Lake vs. Millison, 62 Me., 240.
S. C. 16 Am. R., 456.
Johnson vs. Ry., 13 Am. & Eng. Ry. Cases, 460.
Hay vs. Philadelphia, 22 Am. R., 733.

1 Thompson on Negligence, last edition, section 56, says: "When several proximate causes contribute to an accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened. If one of such efficient causes is due to the negligence of the defendant and the other to an occurence happening without the plaintiff's fault, the defendant is liable for damages. * * * The true course of reasoning is to consider whether the negligence of the defendant was the efficient cause of the injury; if so, the court will not speculate as to whether or not some other cause might also have produced it."

The case of *Mages vs. Ry., 21 Pac., 114,* was where a brakeman in the discharge of his duties was injured by reason of the engine being thrown from the

track by a cow. The engine was without a cow-catcher, and the brakeman knew of this. It was held that the question of his right to recover should be left to the jury.

IV.

Learned counsel also say this was a case of assumed risk, because they say that the plaintiff had no right to rely upon the presumption as to the safety of the engine, because they say it was delivered to him with the distinct understanding that it was going to the shops for a general overhauling. The traveling engineer did not tell the plaintiff that the brakes were defective or that there was no brakes, his attention was never called to this; nor is it contended that the engine was being sent to Little Rock to place any brakes upon it. The only defect mentioned was that brasses had been used in the wheels of the pony trucks and they might become hot. He certainly had the right to presume that the engine was reasonably safe as his attention was not called to any defect which rendered it unfit or dangerous for use. This was not done and, besides, the engine was not on its way to the shops for repairs when the injury happened. They had reached Brinkley with it and there they were ordered to back the engine to Hulbert to take the place of a disabled engine; and as he knew nothing of the fact that there were no brakes on the engine, he certainly had a right to presume that the brakes were in reasonably safe condi-

tion. The jury were properly instructed as to this question (R. 17-18).

Before the court can presume as a matter of law that the servant assumes the risk incident to defective machinery, it must appear that he accepted employment with actual knowledge of such defects or continued in the service after he knew, or in the exercise of reasonable care should have known of the same.

Ry. vs. Keegan, 87 F. R., 849.
Ry. vs. Miller, 24 So., 955.
O'Neil vs. Ry., 86 N. W., 1098.

The doctrine of assumed risk has no application when the servant first discovers the defect at the time of the injury.

Ry. vs. Milam, 50 S. W., 417.
Sackewitz vs. M'f'g. Co., 78 Mo. App., 114.

The servant's implied assumption of risk is confined to the class of work for which he is employed.

Ry. vs. Adams, 23 Am. & Eng. Ry. Cases, 408.

The mere fact that it was stated by the engineer in charge who turned the engine over to Davis that the

engine was to be sent to Little Rock for repairs did not require the plaintiff, a fireman, to inspect it.

Waldheir vs. Hannibal Ry. Co., 87 Mo., 37.

In *Nofsinger vs. Goldman, 122 Cal., 609, (S. C., 55 Pac., 425)*, it was held that a person not an engineer employed about an engine which is inadequate for the work being done with it and which makes steam badly is not chargeable with knowledge of the specific danger to which his employment subjects him. The mere fact that the engine was used under protest would not imply that the plaintiff, a fireman, assumed the risk.

11 Am. & Eng. Ry. Cases, (N. S.), 487 Note.

V.

The doctrine of contributory negligence so far as it has any application in this case was fully covered by the court's charge (R. 16) and need not be discussed further here. When the defendant is charged with negligence, the doctrine of assumed risk and contributory negligence are practically the same.

Ry. vs. Milam, 50 S. W., 417.

VI.

Counsel object to the instruction of the court in which the court instructed the jury as follows, to-wit:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the country is to furnish its employees working tools which are reasonably safe and a place to work in which is reasonably safe" (R. 16). It is true that this form of instruction has been the subject of some judicial criticism. But even when it has been criticised the language used here will relieve it of such criticism, and when the admitted facts in this case are considered it will be seen that such criticism has no application whatever in this case. In the first place the particular language which counsel object to is modified by that which precedes it wherein the court says, "The railroad company is not an insurer of its employees" (R. 17). And it is likewise qualified by that part which follows after the language objected to, wherein the court said, "But if that is shown" (that is, that the machinery or place is not reasonably safe), "if the evidence shows that the employee knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery without giving notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably apprehended from such use and he cannot recover." With these modifications it has been uniformly held that the instruction is not objectionable. The case of *Ry. vs. Johnson, 81 F. R., 680*, to which counsel refer, recognizes this rule.

But when it is admitted, as in this case, that the engine was not supplied with brakes at all, and had been without them for several months or even years, then the question as to this part of the court's charge does not arise.

Pierce vs. Clavin, 82 F. R., 552.

When it is shown that the master has knowledge of the defect of the machinery in use by the servant, then he is negligent and the question of the use of ordinary care in furnishing reasonably safe machinery is no longer one to be considered.

Ry. vs. Gaines, 46 Ark., 570.
Savannah Ry. vs. Pughsly, 39 S. E., 473.

This precise question was before the Supreme Court of South Carolina in a recent case (*Bussey vs. Ry.*) which is reported in *11 Am. & Eng. Ry. Cases (N. S.) at p. 474.* In that case the court instructed the jury, "that the master is bound to supply his servants with sound and safe appliances, and to keep the same in sound and safe condition," and it was there claimed by defendant that this was in effect instructing the jury that the master was bound in law to guarantee the soundness and safety of all machinery he furnishes his employees. But the court at page 482, said:

The sixth exception alleges error as follows: (6th) In charging the jury as follows: "While it is true that a servant who enters the employment of another assumes the ordinary risks of business, this would not include the risks of working with unsafe appliances; for the master is bound to supply his servants with sound and safe appliances, and to keep the same

in sound and safe condition; thus instructing the jury in effect, that the master was bound in law to guaranty the soundness and safety of all machinery he furnishes his employees. And this instruction to the jury, defendant submits, is further erroneous in that it did not take into consideration latent defects in machinery, but was calculated to lead the jury to believe that so far as any defects in machinery are con cerned, whether patent or latent an employee takes no risk with reference thereto. The charge stated in general terms a correct proposition of law, and if the defendant desired that the presiding judge should have charged more specifically, it had the right to present requests to that effect. Furthermore, when this part of the charge is considered in connection with the other parts of the charge it will be seen that the presiding judge did not, in effect, instruct the jury that the master was bound in law to guaranty the soundness and safety of the machinery furnished an employee."

And the last utterance of this court upon this question is conclusive,

In *Portland Gold Min. Co. vs. Flaherty, 111 F. R. Pamphlet, December 3, 1901*, at page 317, the court said:

"Defendant next complains of the following portion of the court's charge to the jury, namely: 'It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work.' Counsel contend that the court should have qualified the word 'safe,' as here employed, by the adverb 'reasonably,' and not having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of this case?

"The court told the jury that the obligation resting on defendant was to use 'ordinary care' to furnish a safe place so as not 'unreasonably' to expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediate following context, namely: 'This duty to use ordinary care, generally, is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances.' The charge, as a whole, on this point was, in our opinion, substantially correct.

"Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous."

Ry. vs. Needham, 69 F. R., 825.

Baltimore & P. Ry. vs. Mackey, 157 U. S., 84.

Rogers vs. The Marshal, 1 Wall., 644-654.

Evanston vs. Gunn, 99 U. S., 660-668.

Tweed's Case, 16 Wall., 504-516.

In *Hemingway vs. Ry.*, 7 *Am. St. R.*, at pages 829 and 830, the court said:

"That part of the charge which made it incumbent upon the employees of the company 'to exercise the utmost care, diligence, and foresight for the safety' of the plaintiff while under their charge, is excepted to upon the ground that such a degree of care was not the rule in such a case. Abstractly considered, it may be that this part of the charge was not strictly correct. The court, however, had just instructed the jury that the negligence of the company must be shown by a

preponderance of the evidence, and accompanied the objectionable language with the explanation that the care of an infant passenger, so unattended, should be greater than that required to be used towards an adult passenger."

In *Ry. vs. Miller, 25 Mich.*, at page 293, the court said:

"But whatever difficulties there may be in some cases, courts are, at least, bound judicially to know, that *no care* is *not due,* or *reasonable care;* that when no care whatever has been used in approaching a known or threatened danger, and no effort whatever to ascertain or avoid it, reasonable care has not been exercised, and the party has been guilty of negligence. There was no difficulty, and the court found none, in correctly determining that certain given statements of facts or courses of conduct would constitute negligence or want of ordinary care."

In *Ry. vs. Miller, 25 Mich.*, at page 291, the court said:

"The laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense and principles of human action—which are assumed as truths in any process of reasoning by the mass of sane minds—constitute a part of the law of the land, and may, and must, be assumed by the court, without being found by a jury; indeed, the finding of a jury, which should clearly disregard them, should itself be disregarded by the court. In other words, courts are bound judicially to know and apply such laws and principles as part of the law of the land. They are bound to know that there is a difference between *reasonable care* and *no care at all,* or utter negligence, and that a prudent man, in the presence of danger, naturally and ordinarily makes some use of his faculties to ascertain and avoid it; and if, upon any occasion, he does not, when he has good reason to apprehend danger, he does not exercise the ordinary

or reasonable care demanded by the circumstances. They are, therefore, bound to know, and judicially recognize, the essential differences in the nature and modes of travel and transportation upon railroads and ordinary highways, both of which are authorized by the law; and, being bound to notice the statutes of the State they must take notice that greater speed in travel and transportation upon railroads is one of the objects of the law authorizing this mode of conveyance; and that locomotives and heavy trains of cars (which are authorized by the legislature) cannot, owing to their momentum when in motion, be suddenly stopped in their course, or turn to the right or left, like a foot passenger, or a team and wagon upon an ordinary highway. * * * "

VII.

Learned counsel for the plaintiff in error in the ninth subdivision of his argument seems to put some stress upon the fourth, fifth, seventh and eighth assignments of error (R., pp. 106, 107). These assignments are in relation to the charge of the court to the jury in reference to their testimony in viewing the engine which is admitted to be like the one on which the injury occurred. But upon examining all that the court said to the jury upon this subject it will be seen that its charge to the jury is proper. The charge of the court to the jury upon this subject must all be considered together in order to determine its full import and meaning. To select a few phrases or paragraphs of the court's charge to the exclusion of all other parts is hardly fair to the trial court and certainly should not receive the sanction of this court. If such a rule is to prevail but few charges of the trial court or even the

opinions of the courts of last resort would stand the test of absolute accuracy in the use of every word or phrase or sentence. It is not that kind of accuracy the law requires. Substantial justice is what the law demands and no more. The following language is used by the court in connection with the parts objected to, to-wit:

"But, on the other hand, I also want to call your attention, and that is the reason you are taken there now, to another matter. *A man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open.*

"Now, if for that reason, that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours (without hunting for it), then the court will tell you that he had knowledge of and ought to have known of it, and he is chargeable with it, as if he had known it" (R., p. 93).

This part of the charge was not objected to except the phrase "without hunting for it," and when considered with the part objected to it is perfectly obvious that there was no error in the charge of the court as to the inspection of the engine. In this part of the instruction the court announces the doctrine contended for by counsel in the most emphatic terms. The jury was told that *"a man cannot shut his eyes and say that he does not want to see anything which a reasonable man could not help but see if he kept his eyes open."* The language used was more favorable to the defendant

than it was entitled to under the law. Learned counsel argues the question as though it was held that the absence of the brakes were a patent defect, if a defect at all. When the words patent or obvious defect is used it must be considered in reference to the position of the party to be affected by such defects. If Holloway's duties had required him to be on the ground at the side of the engine, there might be some reason for such a contention; but Holloway was a fireman and had nothing to do with the care of the engine. The proof shows that he had never seen the engine until the day the injury occurred. On that day he boarded the engine at Hulbert, about sixty miles east of Brinkley, in this State. The grade was almost perfectly level. They ran to Brinkley, and only stopped one time, and Holloway was out of the engine but one time; and then he wrapped some wadding around the hose under the tank in the rear of the engine, and in doing this his back was towards the engine, where he could not see the wheels of the engine nor could he see the brakes nor the absence of them. He says he could not see the brakes or the absence thereof when in the engine from the fact he says the foot boards were twenty-eight or thirty inches wide and extended from the cab to the front end of the engine. That these foot boards were placed directly over the wheels where the brakes would have been (R., p. 85). That these foot boards obstructed the view. Hence the brakes were neither obvious nor patent to him. Barger, who was a brakeman and had worked with this engine for some time, was not sure

whether there were brakes on the engine or not (R., pp. 56, 57). So when the jury went to inspect the engine they had Holloway's statement to the effect that the boards or the absence thereof were not patent or obvious to him because when he was at his place of duty, where he was required to be, he could not see them. Witnesses for the defendant had testified to the contrary. It was the province of the jury under proper instructions to make such investigations as would enable them to determine whether the plaintiff or the other witnesses were wrong. It is immaterial whether this is called mute evidence or not. The jury were permitted to view the engine by agreement, and from their observation it was their duty to determine whether the wheel was in plain view or hidden from one in the engine.

Counsel says that the jury should have been sent to the engine without any instruction. This is indeed a novel proposition. To have sent the jury to the engine without any instruction as to what they were being sent for would have permitted them to have gone into any kind of wild speculation upon questions that were really not before the court. We submit that the circuit court of appeals did not hold "this part of the charges objected to erroneous." The court simply said if this excerpt from the instructions of the court had been all that was said to the jury upon this subject it might have been erroneous—not that it was erroneous, but in fact holding that when considered with the other part of the charge that it was correct.

Learned counsel has committed the same error in criticising the opinion of the circuit court of appeals that he has in the criticism of the charge of the trial court. He selects a few expressions in the opinion and proceeds to criticise them; but the whole opinion should be considered together in order to understand what the court really means.

Ry. vs. Whitten, 13 Wall., 290.
B. & P. Ry. vs. Mackey, 157 U. S., 84.
Davis vs. Ry., 26 Am. & Eng. Ry. Cas. (N. S.), 323.

Tagg vs. McGeorge, 35 Am. St. R., 29.
Shively vs. Ry., 7 Am. St. R., 472.
Hemingway vs. Ry., 7 Am. St. R., 829, 830.
Ry. vs. Watson, 5 Am. St. R., 579, 580.
State vs. Levelle, 27 Am. St. R., 809.

We submit that counsel has committed the error of stating what his conclusion is as to what the testimony shows instead of stating what the witnesses said. We do not think it is true that Holloway stated that the "brakes upon an engine occupy a most conspicuous place." Here is what he stated in reference to the matter:

"They can be seen if a man is on the ground. He can see whether they are there or not. If he is walking up to the engine to get on he can see them" (R., p. 38). Of course, if one was standing by the side of the engine and looked for the brakes he could see them. But it must very often happen that one standing by the

side of the engine does not notice whether it has brakes or not; but this does not apply to Holloway. His duties did not require him to be at a place anywhere while he was on the engine where he could see the brakes. This was a question for the jury. The jury were permitted to view an engine precisely like the one upon which the injury happened by consent of the parties, except that the engine viewed had the brakes. But counsel say that if it was competent for the jury to view the engine at all, that they should have viewed the premises, that is, the place where the injury happened. As the jury were permitted to view this engine by consent, certainly no objections can be interposed now; but this contention cannot be maintained anyhow. There was no dispute as to the collision with the horse. There was no dispute as to the condition and situation of the cars after the accident happened. There was no dispute as to the fact that there were no brakes upon the engine. And a view of the premises would have been impossible, as the wreck had happened a number of miles away and a number of months before the trial of this case. We are unable to see how a view of the premises would have aided the jury. The question in dispute was whether Holloway saw, or, in the exercise of ordinary care, ought to have seen the absence of the brakes. As to this there was a conflict in the evidence, Holloway testifying that they were not in view of him when he was

at his post of duty, the witnesses of the defendant testifying that they were in plain view from the cab. Holloway says that after the defendant's witnesses had testified, or after they had concluded their testimony, he went with his counsel and made an examination of an engine like the one he was on, and verified his statement that he was correct and that the witnesses for the other side were mistaken. Of course, when the jury examined the engine they found that Holloway was correct. Now, if the jury could not use this information thus obtained to determine whether Holloway's or defendant's witnesses were correct, then, of course, the view of the engine was absolutely futile. But counsel say that not only the premises must have been viewed, but that each individual juror should have had the same experience as Holloway. He might have argued with the same reason and force that each juror should have been of the same height and weight. The jury in viewing the engine had to exercise only one of their senses, that is, the sense of sight. The presumption, we take it, would be that the sight or vision of each juror was as good as that of Holloway.

It is argued that the effect of the court's charge was to authorize the jury to base their conclusion entirely upon what they saw without regard to the testimony. Counsel is mistaken in this. Certainly, no suggestion or statement of this nature can be found in the court's charge to the jury to which the defendant has objected and assigned as error. All the court said upon this question is the following:

"Of course, you need not report to the court what you saw, or what conclusions you reach. That will be for you to determine when you retire to the jury room for the purpose of making up your verdict, and you are only taken down there for the purpose of looking at the locomotive as part of the evidence in this case, as there seems to be a conflict, some of the witnesses testifying that they cannot help but see it, and the plaintiff himself says that he did not see it, although he acted as a reasonable prudent man, and that his attention was not called to it.

"If a reasonably prudent person, employed as a fireman, having taken a trip of six hours' duration on it, getting on and getting off for the purpose of making the trip, if a reasonably prudent person who is exercising ordinary diligence could have seen it, then he will be chargeable with it, but he need not hunt for it and need not look for it; he has a right to presume that it was a reasonably safe machine, or if it was not, that his attention would be called to it" (R., p. 94).

This part of the court's charge was not objected to. It is too late now to object to it.

But there is still another reason why the contention of learned counsel cannot be sustained. The exceptions to the several excerpts of the court's charge are general. They point out no particular exceptions, assign no reason for its exception, make no suggestion, offer no subsitutes therefor. In such cases it has been uniformly held that such exceptions would not be upheld or considered.

Bussey vs. Ry., 11 Am. & Eng. Ry. Cas. (N. S.), 474.

S. & P. Ry. vs. McKay, 157 U. S., 86, 87.

Tweed's Case, 16 Wall., 516.

East Oregon L. Co. vs. Cole, 92 F. R., 953.

Allis vs. U. S., 155 U. S., 117.

Tucker vs. U. S., 151 U. S., 164.
St. Clair vs. U. S., 154 U. S., 153.
Humes vs. U. S., 170 U. S., 210
Lindsay vs. Turner, 156 U. S., 208.
Newport News & M. C. V. Ry. vs. Pace, 158 U. S., 36.

The same rule might be applied to the final charge of the court to the jury. The exceptions are general, no reasons are given, no suggestions are offered or other instructions or qualifying instructions. The defendant should have given its reason for objecting to the instructions or should have asked other instructions where it thought necessary and should have asked that the charge be qualified where it thought such charge was objectionable. Counsel cannot sit by and not call the attention of the court or opposing counsel to the reasons of such objections and thereby lead the court into the belief that there is no serious cause of objection, and then, after the case has been tried for the first time on appeal, make his objections specific. This should have been done in the trial court. Learned counsel in this case did not offer an instruction or suggestion defining the duties of the master to the servant. Doubtless, if the suggestions had been made to the court that defendant desired it given in the way now suggested by it, the court would have readily made the qualification, and, doubtless, counsel for plaintiff would have insisted that it should be made. Learned counsel is as unfortunate in his criticism of the opinion rendered by the circuit court of appeals in this case as

he is in his criticism of the charge of the trial court. He says that after the court had held that the company was negligent as a matter of law because the engine was not provided with brakes, he then says the court proceeded to state some exceptions to this rule. We think counsel is mistaken in this. The court in enunciating the doctrine referred to some instances in which the mere failure to supply an engine with brakes might not be negligence *per se*, that is all.

Counsel then says that the court in deciding this case overlooked important facts and bases its decision upon some facts not to be found in the record. This is a very broad statement and is in direct conflict with the language used by Judge Sanborn, who wrote the opinion. He says in substance that " the court made a careful and painstaking examination of the testimony."

Then the counsel ask where is the evidence to sustain the statement that "the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad." In the first place it was not necessary to introduce any proof upon this question. The plaintiff, among other things, alleged "that the engine was a regular road engine" (R., p. 11). The defendant does not deny this, but practically admits it. It says in its answer: " It denies that it was negligent because the said engine was a regular road engine" (R., p. 14). Here is a charge that it was a regular road engine, and an admission that it was a road engine. The plaintiff only denies that it was negligent because of the fact that it was a regular road engine.

If it was a regular road engine as charged by the plaintiff and admitted by the defendant, we are at a loss to know to what use it could be put if not to haul loaded trains or cars; but this is shown by the record. Barger says he worked on this engine at Hulbert for several months in the pit" (R., p. 57). The proof shows that this was a place where there could be no switching, and the engine was used by him in hauling cars loaded with gravel to different parts of the road. Roberts, the expert witness of the defendant, testifies as follows: "There was a necessity for the engine going to Hulbert as soon as it could get there. At Hulbert they had a dirt pit from which they were taking out dirt and putting it on the road. This was the reason for sending this engine back" (R., p. 67).

Witness also testifies: "The engine was ordered to back up to Hulbert in order that it might be turned right to work in the pit." The engine had to be worked ahead of the cars so that the engineer could see right ahead of him when he was loading or unloading the gravel cars. They had no means of turning the cars when they got to Hulbert, and in order to do so they would have to carry it to Hopefield, some little distance (R., p. 68). This shows that the engine had been at Hulbert for several months to haul loaded cars, and was returning for that purpose. But it is absolutely immaterial whether it was a road engine or a switch engine. It was then being used and had been used as a road engine and when used as a road engine it should have been supplied with brakes as a road engine. But we say

whether it is a road engine or not it should have been supplied with brakes. Holloway testifies that in his long years of experience as a brakeman and as a fireman that he had never seen an engine operated without having brakes before.

Again learned counsel ask where the evidence can be found in this record to support "the assumption of the court of appeals of the absence of brakes on this engine." He is as unfortunate in this inquiry as in the other one. The plaintiff, among other things, alleged that "the brakes on the engine were out of repair; that when the air was applied the brakes would not clasp the wheels; that there were no shoes or clasps on the brakes" (R., p. 11). The defendant in its answer denies "that the brakes were out of repair and could not be worked at the time of the injury, but alleges that said engine had no brakes whatever upon the engine" (R., p. 14). Is this positive allegation in the answer that the engine had no brakes not sufficient to justify the court in assuming that it had none. But this fact also appears from the testimony of the defendant's own witnesses. Wells testified that there were no brakes upon the engine (R., p. 70). Section 5722, Sandels & Hill's Digest of the Statutes of Arkansas, provides that the "answer shall contain a denial of each allegation of the complaint controverted by the defendant." In other words, that which is not denied in the answer is admitted to be true and no proof is necessary to be taken. We think this is the universal rule where the States have adopted the code practice.

Learned counsel contend that the use of such an engine without brakes is not negligence as a matter of law, and then he says it is shown by the testimony of Roberts that "this engine had been operated without any brakes by the White & Black River Railroad, of which he had been master mechanic," etc. We submit that counsel is mistaken as to this. Roberts' testimony shows that the engine had been owned by the White & Black River Railroad for perhaps two or three years; but there is not a word in his testimony to show the manner of its use. The proof in this case shows conclusively that it is more dangerous to operate an engine without brakes than one with them. Holloway testified that at the time the engine collided with the horse he could have seen the horse about sixty to seventy-five feet in front of them. He also testifies that if there had been brakes on the engine when the air was turned on it could have been stopped a great deal quicker. Barger, a witness for plaintiff, says: "If there were no brakes upon the engine it would have to go from 100 to 125 feet further. If both the engine and the tank had been supplied with brakes it ought to have been stopped within sixty to seventy-five feet," thus showing if the engine had been supplied with brakes when the horse was first seen, that they could have stopped the engine before the collision and prevented the injury. Farrell, a witness for the plaintiff, says: "With the engine and tank properly equipped with brakes and running at the rate of seven or eight miles an hour

it could be stopped in from sixty to seventy-five feet" (R., pp. 53-81). Roberts, a witness for the defendant, says it ought to have been stopped within thirty-five to forty feet. It could be stopped some quicker if it had brakes on the engine (R., pp. 66, 67). Welch, a witness for the plaintiff, says: "With a good tender brake it ought to have been stopped within forty-five to fifty feet" (R., pp. 70, 71). The proof shows that the horse was discovered on the track from sixty to seventy feet before it was struck by the engine. Now, what is the inference to be drawn from this testimony and the only inference? It is shown from the testimony that the engine without brakes would run from thirty to forty feet further after an effort is made to stop it than it would have gone if it had been supplied with brakes. In this connection the court charges the jury as follows, to-wit:

"Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff suffered his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff, and Davis, the engineer" (R., p. 18).

In this the jury were called upon to say by their verdict whether if the engine had been supplied with brakes the injury would have occurred. If so, they should find for the defendant. The real issue was accurately and concisely put to the jury and they found by their verdict that the injury was caused by reason of the absence of the brakes. Then why all this argument as to whether operating an engine without brakes is negligence *per se*? The jury has found that if the engine had been properly equipped with brakes the injury would not have occurred. Therefore, if by reason of the absence of the brakes the injury did occur, the defendant is responsible. The proof shows that it was negligent, and that such negligence was the sole cause of the injury. The charge of the court in this case was exceedingly fair to the defendant and the real issues were fairly submitted to the jury.

Counsel contend that other issues of fact should have been submitted upon proper instructions. There is nothing in the record to show that other issues should have been submitted; but if it did, why did not counsel for defendant prepare instructions or make some suggestions to the court, calling its attention to the facts proved and asking instructions covering such facts or assumed state of facts. It is too late after reaching this court for the first time to say that the court overlooked important facts and should have instructed the jury upon the same. If learned counsel had made any suggestions to the court as to instructions not given, it must be presumed that the court would have given them if they were proper.

Learned counsel admits that he has gone outside the record in his argument, but attempts to justify himself, because he says the circuit court of appeals went outside of the record. Even if that were true, we hardly think that would justify counsel in inflicting punishment upon this court by discussing matters not of record and which in the nature of things cannot be considered here. We think, however, that we have shown by quotations from the evidence and pleadings that every fact mentioned by the circuit court of appeals in the record in its opinion may be found in the record. Hence, we shall not follow learned counsel by going outside the record.

VIII.

Counsel mentions quite a number of other assignments of error, but they have already been discussed as far as we care to discuss them. He complains, among other things, of the court's charge as to the measure of damages. Upon this question, we call the attention of the court to the evidence of Dr. Sharp (R., pp, 22, 23), and the testimony of the plaintiff (R., pp. 30, 31). From this testimony it is perfectly obvious that the court's charge was correct, and that the damages were absolutely inadequate for the injury received. And, besides, if counsel had wanted any specific charge upon this question, it was his duty to offer such instructions or modifications, and, as they did not, their objections are general and cannot be considered here.

Bussey vs. Ry., 11 Am. & Eng. Cas. (N. S.), 482.

Ry. vs. Soper, 59 F. R., 879.

T. & P. Ry. vs. Cody, 166 U. S., 606.

T. & P. Ry. vs. Volk, 151 U. S., 73.

Goldsby vs. U. S., 160 U. S., 77.

IX.

While we concede the fact that every person has the right to an appeal when he deems that he has been injured by the action of the lower court, whether in its instructions or its rulings as to the admissibility of the testimony; but we submit that in this case no such question of law is involved, that every question has been so often decided by the courts of the country that they have become elementary. We therefore submit that the penalty of 10 per cent should be taxed against the defendant in error, as provided in Section 1062, Sandels & Hill's Digest, which has been approved and enforced by the Circuit Court of Appeals for the Eighth Circuit.

Ry. vs. Elliott, 102 F. R., 96.

The opinion of the circuit court of appeals in this case (114 F. R., 458), is so full and complete that we do not deem it necessary to argue the case further.

Respectfully submitted,

JOHN W. BLACKWOOD,

M. HOUSE,

J. W. HOUSE,

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 68.—October Term, 1903.

The Choctaw, Oklahoma & Gulf Railroad Company, Plaintiff in Error, *vs.* Will Holloway. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 30, 1903.]

Mr. Justice Peckham delivered the opinion of the Court.

Holloway, the plaintiff below, brought this action in a State court of Arkansas, against the railroad company, to recover damages for personal injuries alleged by him to have been sustained through the negligence of the company while he was in its employ and acting as fireman on one of its engines. The action was removed into the United States ~~District~~ Court in Arkansas, on account of the company being incorporated under an act of Congress.

Upon the trial the jury found a verdict for the plaintiff, and upon writ of error from the Circuit Court of Appeals the judgment entered upon the verdict was affirmed, (114 Fed. Rep. 458,) and the company has brought the case here for review.

The amended complaint alleged that the plaintiff was on October 27, 1900, in the employ of the defendant company as a fireman, and that on the night of October 31, 1900, while he was so engaged, the engineer of the engine on which he was employed received orders from his superior officer, directing him to back up his engine, (consisting of an engine and tank or tender,) from Brinkley east to Hulbert, a distance of about sixty miles, and that upon receiving the orders the engineer and the plaintiff requested that they be permitted to reverse or turn the engine so that the headlight would be in front and the tender or tank in the rear, and they would thereby be enabled to run the same with greater safety, but this request was refused, and they were directed as stated; that, in obedience to the orders, they left Brinkley about 11 o'clock at night, and continued to run the engine backward until it reached a trestle about thirteen miles east of Brinkley, when they ran upon and collided with a horse upon the said trestle, without fault upon their part, and the switch engine was derailed and plaintiff caught between the tank or tender and the engine, and seriously and permanently injured.

One ground upon which negligence of the defendant was founded was, as alleged in the complaint, the bad condition of the brakes on the engine,

which it was alleged were not in a condition to work; that the same were out of repair, and that there were no brake shoes on the brakes of the engine, and as a consequence the engine brakes could not be worked, and therefore when the engineer discovered the horse on the track and applied the air brakes, those on the wheels of the tank or tender were successfully applied, while on account of the absence of shoe brakes on the engine, the brakes could not be worked, and the effect of applying the air brakes was to stop the tank or tender without having any effect on the engine, and the engine was therefore forced with all its weight and momentum against the tank or tender, thereby breaking the cast-iron connection between the engine and tank or tender and bringing the ends of the engine and tank close together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank he was caught between the same and thereby injured; that he had only been on the engine for a few hours and knew nothing of the dangerous condition of the engine brakes.

These various allegations of the ignorance of the plaintiff and of orders given to back the engine were denied by the defendant. The company averred that the engine had no brakes whatever on it, and that the brakes on the tender or tank were in good working condition, and it denied that it was in anywise guilty of negligence which caused the injury. It also averred that if the defendant sustained any injury it was due to his own carelessness or negligence, and was the result of a risk assumed by him for which the defendant was not liable.

The chief defense was founded on the allegation that the defendant assumed whatever risk there was in his occupation of fireman on the engine in question, and that he in fact knew perfectly well that the engine had no brakes, and that he could not but have observed that fact on a ride of fifty or sixty miles, which he had taken on the engine prior to going out on it the evening in question.

The plaintiff, however, swore distinctly that he did not know of the absence of brakes on the engine. By the consent of the parties, the jury viewed the locomotive, and the court gave the jury instructions in relation to that matter, and told them that in examining the engine—

"You will go inside and try to put yourselves only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed for several hours doing work on the engine as a fireman—that is, whether he could easily see them by just keeping his eyes open."

And the court also stated:

"A man cannot shut his eyes and say he don't want to see anything which a reasonable man could not help but see if he keeps his eyes open.

"Now, if for that reason—that is, if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours, (without hunting for it,) then the court will tell you that he had knowledge of, and ought to have known it, and he is chargeable with it as if he had known it."

Taking the whole charge together upon the subject of the knowledge by the plaintiff of the absence of brakes on the engine, we think there was no error in the judge's charge. It amounted simply to a direction to the jury that the man was bound to use his eyes, and if by their use he could see that the machinery was defective, he was bound by that fact, even though in truth he had not observed it, but that he was not bound to make a careful examination of every particle of an engine upon which he was fireman in order to charge the defendant with negligence or to exonerate himself from the charge of contributory negligence.

Upon the subject of the duty of the defendant to furnish safe machinery, the court said:

"By the laws of the country the defendant was bound to furnish its employes working tools which were reasonably safe and a place to work in which was reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employes it is not liable for the injuries sustained by him."

Freed from the surrounding facts, and viewed simply as an abstract proposition, it might be maintained that the court erred in its charge that the company was bound to furnish its employes working tools which were reasonably safe and a place to work in which was reasonably safe, and when it has done that it has discharged its duty. The charge left out the condition that an employer is only bound to take ordinary and reasonable care, as applied to the circumstances under which the liability arises, to furnish reasonably safe appliances and machinery. (*Hough* v. *Railroad Company*, 100 U. S. 213, 218; *Union Pacific Railway Company* v. *O'Brien*, 161 Id. 451.) But the fact that the company had failed to supply such a machine because of the absence of brakes had been fully proved by uncontradicted evidence, and, indeed, was conceded by the company. The circumstances, unexplained, were such as to make the omission to furnish a brake for the engine *prima facie* negligence on the part of the company. It was unexplained by any evidence, and remained as a fact proving negligence. There was no occasion, therefore, to call attention to the fact that the company was only bound to exercise reasonable care to supply a reasonably safe engine, because the uncontradicted facts showed it had not furnished such an one, and there was no evidence that it had exercised ordinary or reasonable care to furnish it, but on the contrary there was

evidence to show that it had not, and it was unexplained and uncontradicted. The failure of the court to call the attention of the jury to this limitation of liability was unimportant because of the evidence already given, which showed the defendant had not complied with the limitation.

It is insisted, however, on the part of the defendant, that the court erred in not holding that the absence of brakes on the engine was not the proximate cause of the injury; that the presence of the horse on the trestle was the proximate cause of derailing the tender and engine, and that the company was not guilty of any negligence by reason of which the horse came upon the trestle.

We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the engine. At any rate, there was evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine in good order and fit for use.

It may be assumed that there was no negligence on the part of the defendant by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident was, therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true.

The obstacle is one of the things which caused the necessity to use the brake, and it is the neglect of the company in not furnishing the brake which constitutes an immediate and proximate cause of the injury.

The finding of the jury under the instructions of the judge must be regarded as finding that the accident would not have occurred if there had been a brake on the engine.

These are the principal objections to the judgment under review. The other matters appearing in the record we have examined but do not find that they are of sufficient importance to require any further notice. The judgment of the Circuit Court of Appeals for the Eighth Circuit is, therefore,

Affirmed.